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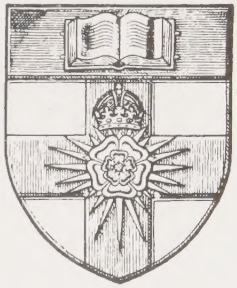

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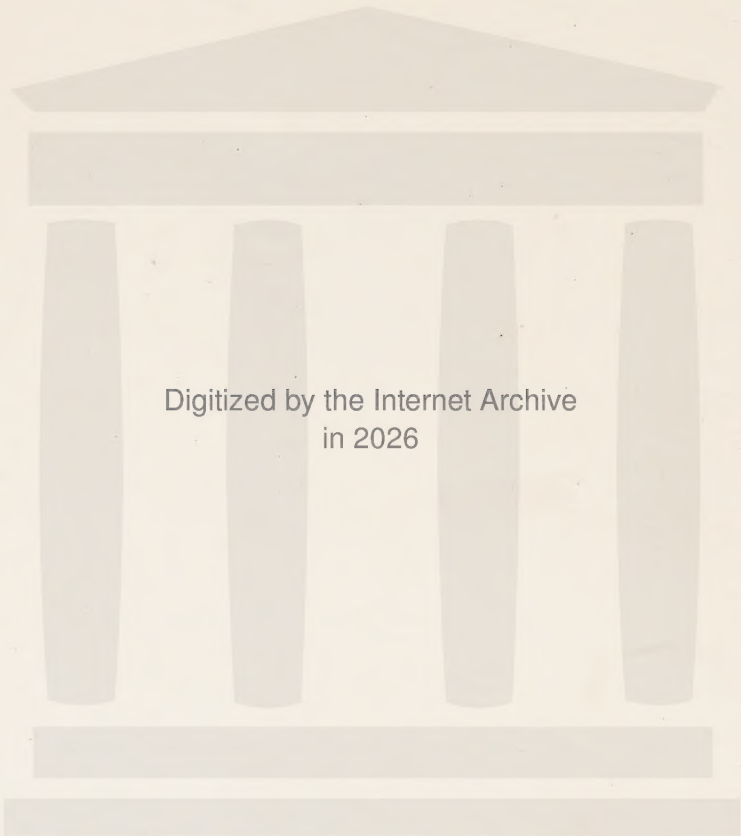

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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

JANUARY 14, 1924, TO MAY 4, 1925.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE ROCHE.

GEORGE POOLE.

1924
14 *January.*

Mitigation of sentence in view of special circumstances and previous good character.

Appellant was convicted at Devizes Assizes on October 18th, 1923 (with another man who was recommended to mercy by the jury and sentenced to twelve months' imprisonment with hard labour), of sodomy and gross indecency, and was sentenced by Avory J. to five years' penal servitude for the former, and to six months' imprisonment with hard labour (concurrent) for the latter offence. On December 21st the Court gave him leave to appeal against sentence. He was not present.

The Court, in view of special circumstances disclosed by the evidence and appellant's previous good character, reduced the former sentence to eighteen months' imprisonment with hard labour.

Sentence reduced.

JACK ROGOFF.

Severity of sentence on aliens.

S. Friedman, 10 *Cr. App. R.* 72: 1914, *confirmed.*

Appellant was convicted at the Central Criminal Court on November 21st, 1923, before the Common Serjeant, of obtaining money by false pretences, and was sentenced to fifteen months' imprisonment with hard labour and recommended for expulsion.

1924
14 *January.*

JACK ROGOFF.

Hewart L.C.J.
Sankey J.
Roche J.

Against that recommendation the Court on December 17th gave him leave to appeal.

A. Bryan for the appellant, who was present. Appellant came here when he was fourteen, that is, ten years ago, his family having previously migrated here from Poland. Both he and his brother had volunteered for service in the British Army in 1914, and he had only been discharged as invalid.

The LORD CHIEF JUSTICE: The Court, following *S. Friedman*, 10 Cr. App. R. 72: 1914, sets aside the order for expulsion, because (1) appellant is only twenty-four; (2) he has never been convicted before; (3) his family is domiciled in London; (4) he volunteered for our Army. The rest of the sentence will date from the notice of appeal.

Recommendation of expulsion quashed.

Solicitor for Appellant—*A. Slater & Co.*

DAVID MELANY.

Where "corporal identification" is not possible, there is no objection to the photograph of a suspected person being shown before the arrest of such person to a person invited, or to be invited, to identify.

Appellant was convicted at the Central Criminal Court, on November 24th, 1923, of stealing £400 from one Chioco, and was sentenced by the Recorder to three years' penal servitude.

R. Oliver for the appellant, who was present.

Vesey Fitzgerald for the Crown.

Only one point calls for report. At the trial and on appeal it was argued that the evidence of identification of appellant was not complete or sufficient. One of the particulars of misdirection

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14 *January.*

DAVID MELANY.

Hewart L.C.J.
Sankey J.
Roche J

filed was "Failure to warn the jury as to the danger of the prosecutor's identification after he had seen the photograph."

The facts appear in the judgment.

It was admitted that Dr. Chioco had had ample opportunity of seeing the man who had stolen his money.

The LORD CHIEF JUSTICE, in the course of the argument, remarked: If a witness is asked to identify and that witness is shown the photograph of the person before what has been called a "corporal identification," that is one thing. It is quite another thing where the person has not been arrested and the police are in the greatest doubt who is the culprit. If in that state of the evidence photographs are put before the prosecutor and he is invited to say who among these is the person who ought to be arrested, there is a great difference (*a*).

In giving judgment, the LORD CHIEF JUSTICE said: Dr. Chioco was shown by the police a large number of photographs in a book. We have seen that book, and the photographs were most fairly arranged and in great numbers, lithographed photos arranged in a series of nine. The question was not if this is somebody who can identify somebody now in custody, but who is the person this man thinks that we ought to arrest? That is a very different question. The doctor picked out without any hesitation the very striking photograph—front face and side face—of this appellant. On the following day the doctor was taken to Scotland Yard. He was again shown various photographs, and he picked out another photograph of the appellant, this time in different clothes. "That," he said, "is the man who took my money." A little later on he was arrested.

Appeal dismissed.

Solicitor for the Appellant—*Edgar Smith.*

H. C.

(*a*) See *W. Goss*, 17 Cr. App. R. 196 : 1923 : c. q.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE McCARDIE.

1924
21 *January.*

YASUKICHI MIYAGAWA.

A person who in this country is in possession by bills of lading, or otherwise, of drugs within No. 1 *of the Regulations under the Dangerous Drugs Act,* 1920, 10 & 11 *Geo.* 5, *c.* 46, *which are in a foreign country, whence he intends to ship them to another foreign country may be guilty of procuring within No.* 3 *of the said Regulations, which is:* "*No person shall supply or procure or offer to supply or procure any of the drugs to or for any person whether in the United Kingdom or elsewhere.*"

Appeal against conviction and application for leave to appeal against a sentence of penal servitude. Appellant was convicted at the Central Criminal Court, on December 12th, 1923, after a trial before the Recorder lasting three days, of offences under the Dangerous Drugs Act, 1920, 10 & 11 Geo. 5, c. 46, amended by the Dangerous Drugs and Poisons (Amendment) Act, 1923, 13 Geo. 5, c. 5, and was sentenced to three years' penal servitude in respect of one of them, and to pay the costs of the prosecution, and was recommended for expulsion.

There was no dispute about the facts: the only point calling for report is a purely legal one.

Sir H. Curtis Bennett, K.C. (with him *Whiteley, K.C.*, and *Frampton*), for the appellant, who was present. Appellant, a Japanese, was indicted for "procuring in the City of London" morphine contrary to the provisions of the Dangerous Drugs Acts and the regulations made thereunder. The facts proved were that he was dealing in London with a cargo of morphine, of which the bills of lading were in his possession, lying at Marseilles for despatch, as he alleged, to Japan.

The relevant sections, &c. are in the 1920 Act. S. 6: "It shall not be lawful to import or bring into or to export from the United Kingdom any drug . . . except under licence." S. 7:

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21 *January.*

YASUKICHI MIYAGAWA.

Hewart L.C.J.
Avory J.
McCardie J.

". . . Provision may be made by regulations [by a Secretary of State: s. 13] for controlling the manufacture, sale, possession and distribution of those drugs . . . ," and accordingly, on May 20, 1921 (No. 865), among others, was promulgated Reg. 3: "No person shall supply or procure or offer to supply or procure any of the drugs [including morphine: Reg. 1] to or for any person whether in the United Kingdom or elsewhere . . . (a) unless he is licensed . . . or . . . authorised . . . to supply the drug . . . &c." (*a*).

It is submitted that in an indictment founded on this regulation "for procuring in the City of London"—the prosecution having chosen to proceed thus, when no doubt they might have framed the charge otherwise—there was no evidence of a procuring in the City of London. So much is this so that, a gap in the law having been discovered, the Act of 1923 was passed, of which s. 2 (1) (d) is: "Any person . . . who in Great Britain aid, abets, counsels or procures the commission in any place outside Great Britain of any offence punishable under the provisions of any corresponding law in force in that place, or does any act preparatory to, or in furtherance of, any act which if committed in Great Britain would constitute an offence against this Act, shall be guilty of an offence against this Act," and the maximum sentence was very greatly increased. Hence, the earlier statute only aimed at prohibited drugs which come to this country: there must be a procuring here. Indeed, the count alleged that the drugs were procured "for M. & Co. of Japan": there must be physical control in this country.

[McCARDIE J. referred to *H. Robinson*, 1915, 2 K. B. 342; 84 L. J. K. B. 1149; 79 J. P. 303; 24 Cox, C. C. 726; 11 Cr. App. R. 124: c. q. There the meaning of "attempt" to commit a crime was cut down and an "act preparatory to" committing a crime was held not indictable.

AVORY J.: That is very old law.

McCARDIE J.: The Act of 1923, no doubt, put in the words "act preparatory to" to get over this difficulty.]

(*a*) Reg. 14 is: Any of the drugs in the order or disposition of any person shall be deemed to be in his possession.

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21 *January.*

YASUKICHI MIYAGAWA.

Hewart L.C.J.
Avory J.
McCardie J.

Travers Humphreys (with him *Roome*) for the Crown was not called on.

The LORD CHIEF JUSTICE (dealing with this point) said: The Court cannot accept the argument that there was no "procuring" in the City of London in this case: Reg. 3 expressly says "for any person whether in the United Kingdom or elsewhere," and the indictment alleged "for M. & Co. in Japan." Appellant had the bills of lading for the drugs in his pocket, and therefore the power of transferring the property in them. There was no misdirection.

The sentence was not too severe. No doubt the appellant was a foreigner and may not, as was said on his behalf, have known of the increased severity of the later Act. But the correspondence in the case clearly showed that he knew that he was breaking the law of this country.

Appeal dismissed.

Solicitor for the Appellant—*Percy Robinson.*

WILFRED BOWLER.

Severity of sentence.

Appellant was convicted at the Leeds Assizes, on December 8th, 1923, of rape, and sentenced by Talbot J. to ten years' penal servitude. He appealed against the sentence.

Thorpe for the Crown. After this conviction he was convicted for a similar offence in July previous to this, which was in August.

The LORD CHIEF JUSTICE: Appellant is twenty-two and his character had been good till this offence was committed. The medical evidence showed that there had been no physical injury. The sentence is reduced to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

H. C.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE GREER.

ARTHUR HODGSON.

1924
24 *January.*

Where on the trial of a sexual offence a female witness is obviously embarrassed and diffident to go into details a conviction will not be quashed merely because the learned judge, in order to explain and supplement answers she has already given, puts a leading question to her.

When leave is sought to add new grounds of appeal they should be communicated to the Registrar.

Appellant was convicted on November 23rd, 1923, at the York Assizes, before McCardie J., of incest with his daughter, who was fifteen years of age, and sentenced to three years' penal servitude. On December 20th he obtained the leave of the Court to appeal against conviction and sentence.

Vaughan E. G. Williams for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Only two points call for mention.

Counsel asked leave to add grounds of appeal to those stated by appellant (without legal aid).

The LORD CHIEF JUSTICE: The proposed grounds should have been communicated to counsel for the Crown or to him through the Registrar. That is the practice of the Court, where there is time.

Burnand, for the Crown, said that in this case he would not be embarrassed by want of notice.

The Court accordingly gave the leave asked for.

Williams. One ground of appeal is that when the girl was in the box the learned judge put a leading question to her on a material issue, the most material in the case.

1924
24 *January.*

ARTHUR HODGSON.

Hewart L.C.J.
Avory J.
Greer J.

[AVORY J.: Did you object?]

No. The harm done could not be repaired by any objection, and taking the objection would have prejudiced the case in the eyes of the jury.

After she had told her story in detail the learned judge asked her, "Did he put his person into you?" and she said "Yes." On that ground alone he asked the Court to apply s. 4 of the Criminal Appeal Act. He cited *R. Wilson*, 9 Cr. App. R. 124: 1913: c.q.; and *A. Coleman*, 16 Cr. App. R. 73: 1921: c.q.

Burnand for the Crown was not called on.

The LORD CHIEF JUSTICE: With regard to the point that a leading question was asked by the learned judge, there was here a mass of evidence for the Crown which, if accepted, showed overwhelming admissions of guilt. Here was a young girl giving evidence in public against her own father. She was naturally much embarrassed. It was necessary to get precision in her replies, and the questions referred to were all of an explanatory and supplementary kind. The sentence was not too severe.

Appeal dismissed.

HAROLD MALCOLM GRAHAM AND THOMAS ANDERSON.

Convictions quashed on the ground of evidence of previous convictions having been wrongly admitted.

The former appellant appealed against conviction, and the latter applied for leave to appeal against conviction and sentence. They were tried together on December 12th and 13th, 1923, at Leeds Assizes on an indictment for uttering a forged share certificate and obtaining by false pretences, and on conviction were sentenced by McCardie J., respectively, to seven and three years' penal servitude. There were other indictments still untried. The appeal and the application were heard together.

E. C. Chappell for Graham (under s. 10 of the Criminal Appeal Act, 1907), who was present, as was the applicant. The

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24 *January.*

HAROLD MALCOLM GRAHAM AND THOMAS ANDERSON.

Howart L.C.J.
Avory J.
Greer J.

facts are complicated, but the gist of the appeal is that previous convictions of both men were unwarrantably revealed to the jury. It is agreed that both must stand or fall together. By a mere accident, after prisoners were given in charge to the jury on this indictment, counsel concerned about one of the other charges against them made an application to the Court for postponement. When Anderson's counsel, objecting, said something about carrying on a substantial business, the learned judge said, "Are you serious in saying this before the jury? Look at my Calendar with the cross against Anderson: is that true?" "Yes," said counsel, "and it will all be put to the jury soon."

Again, during the trial, to disprove an allegation by Graham, charged as a false pretence, that he had been in India for twenty years previously, the Crown put in a conviction and sentence to three years' penal servitude at Winchester Assizes within that period. Graham had been thus forced to put in a document to prove that he was in India from 1907 to 1912, and this paper was also evidence of good character. Thereupon the learned judge allowed the prosecution to treat this as putting his character in issue.

(He was stopped by the Court.)

J. Neal for the Crown. Evidence of Graham's previous convictions was admissible to show:—

(a) That Graham was not and never had been a major. He himself admitted that he would not be entitled to the rank after conviction for a felony.

(b) That he had not been in India during the last twenty years.

(c) He had put in evidence of character—a very good discharge from his colonel—no doubt to prove something else, but this evidence was afterwards relied on about character.

(d) To rebut the defence that he had innocently handed on the forged document.

The reference by the learned judge to Anderson's convictions at the beginning of the trial could not have done harm as it was, from beginning to end, part of Anderson's case that he had been previously convicted.

The forgery indicted was by Graham of a share certificate purporting that he held 1,500 shares. One of the false pretences

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24 *January.*

HAROLD MALCOLM GRAHAM AND THOMAS ANDERSON.

Hewart L.C.J.
Avory J.
Greer J.

alleged was that he had been a major in the Indian army up to and including the date of the pretences. Another alleged against both was that Graham had been in India for twenty years and had recently returned.

The cross-examination of Graham about his previous convictions was at the express suggestion of the learned judge on the ground that Graham had put in evidence of good character.

The Crown was entitled to call rebutting evidence to show that Graham was not in India when he stated that he was, even if that evidence disclosed that he was in prison in England.

The LORD CHIEF JUSTICE: There can be no doubt that evidence was improperly admitted more than once that these appellants had been previously convicted, and it is impossible to say that the verdict was not influenced thereby. The convictions must be quashed, but appellants will be remanded in custody to answer the other indictments against them.

Convictions quashed.

H. C.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE ACTON.

---

4 *February.*

JOSEPH JAMES SCOTT.

The Court permits a notice of abandonment of appeal to be withdrawn only in exceptional circumstances.

Applicant was convicted at Manchester Assizes, on December 7th, 1923, of rape and sentenced by Branson J. to seven years' penal servitude. On the 11th he entered an appeal, which he formally abandoned on the 21st. He now asked for leave to withdraw the notice of abandonment.

Herbert Bown for the appellant, who was not present. The notice was given under a mistake: applicant misunderstood his

1924
4 *February.*
JOSEPH JAMES SCOTT.
Hewart L.C.J.
Shearman J.
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solicitor to say that his fellow-townsmen were raising funds to prosecute an appeal and that they would do all that was necessary to enter it, &c.

In answer to the Court, counsel said that that statement was corroborated by a letter from the country solicitor, who was in Court, ready to depose.

Application granted.

The application was then heard on its merits and dismissed, but sentence was allowed to run from January 14th, when the application would have been heard in due course.

Solicitors for Applicant—*Humphreys & Sons* for *Longton & Lewis*, Warrington.

VICTOR LEIGH HICKS.

When a Court of trial is asked to take into account in sentence outstanding charges against a convicted person, a list should be put in definitely stating which charges have been so taken into account.

Applicant was convicted of larceny, on January 2nd, at the Derbyshire Sessions, and sentenced by the Chairman to five years' penal servitude, and asked for leave to appeal against conviction and sentence.

The LORD CHIEF JUSTICE (after dealing with the grounds of the application): In this case, and in two others in the list to-day, it is not easy to see what other charges were taken into account by the court below when it passed sentence. There is no note here on the indictment. The most convenient procedure is for the officer in charge of the case to make a list of the places, dates and offences alleged with which the court of trial is asked to deal, and to state also on which charges warrants have been issued. That list should be filed in the court below and in this Court.

Application dismissed.

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EDWARD LLOYD.

On an allegation of breaking and entering the jury must be directed on the issue of breaking.

When a trial has been set aside on a venire de novo *the conviction quashed should not be mentioned to the jury at the second trial.*

For a previous appeal in this case, see 17 Cr. App. R. 184: 1923: c. q.

Appellant was convicted at the Surrey Sessions of housebreaking, on January 1st, and was sentenced by the Chairman to twelve months' imprisonment with hard labour. He appealed against conviction and sentence.

V. M. Ruston for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The indictment was under s. 27 (2) of the Larceny Act, 1916, 6 & 7 Geo. 5, c. 50. There was serious misdirection.

[The Lord Chief Justice: And the Chairman told the jury that there was a conviction on the first trial.]

The Chairman did not make it plain to the jury that they must decide the point whether there was a breaking: if there was not, the question of "intent to commit a felony" does not arise. There was no other count, and no indictment for theft. The door pushed open was in fact propped up within and defendant was found under a settee.

(He was stopped by the Court.)

A. H. King, for the Crown, could not defend the summing-up.

The Lord Chief Justice: The summing-up was inadequate.

Conviction quashed.

WILLIAM CAMPBELL MAXWELL.

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Severity of sentence after many previous convictions.

Appellant was sentenced by the Chairman at the Hampshire Sessions, on January 1st, on a plea of guilty to two indictments, one for stealing two cheque forms and the other for larceny of a bicycle, to five years' penal servitude. He appealed against sentence.

No counsel appeared and appellant was not present.

The Lord Chief Justice: This appellant has been convicted nineteen times previously, though he is only forty-one years old, sometimes to short terms and once to a term of four years' penal servitude (after a shorter term). It is a difficult question whether a man of bad character should be sentenced solely with reference to the substantive offence with which he is charged, or whether his previous convictions should always be considered. But at any rate it is clear that a heavy sentence should not be passed for a minor offence merely because the prisoner has previously committed serious offences. This sentence is reduced to one of twelve months' imprisonment.

Sentence reduced.

ALEXANDER GEORGE GRAY.

Sentence reduced in view of meritorious military service.

Appellant was convicted, on January 7th, at the Bristol City Sessions, of shopbreaking, and was sentenced by the Recorder to twenty-four months' imprisonment with hard labour. He appealed against sentence.

Appellant, in person, handed in a statement.

Acton J.: This appellant served five years in the army and was discharged with a very good character. Hence, despite his previous convictions and without any disrespect to the learned Recorder—and, indeed, partly at his instance—the Court thinks that the term may be reduced to twelve months.

Sentence reduced.

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WILLIAM WATKINS AND WILLIAM MORGAN.

Severity of sentence.

Appeals against sentences of three years' penal servitude passed by the Chairman at the Monmouthshire Sessions, on January 2nd, for housebreaking.

Appellant Morgan in person, the other appellant was not present. Neither was represented by counsel.

The Court reduced the sentence, although there were previous convictions against each appellant, to twelve months' imprisonment with hard labour.

Sentences reduced.

SAMUEL PARKER.

A mere reference to a meritorious discharge from the army by an undefended prisoner in a statement handed to the court of trial does not necessarily expose him to cross-examination on his character generally (though it may do so on his career in the army).

Such a statement should be looked through in his interest and nothing read to the jury of the legal consequences of which he is not aware.

Appellant was convicted at the Somerset Sessions, on January 2nd, of knowingly receiving a stolen coat and waistcoat on an indictment charging him with two others (who pleaded guilty) of stealing and receiving, and was sentenced by the Deputy-Chairman to twelve months' imprisonment, with hard labour. He appealed against conviction and sentence.

T. J. O'Connor for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was not represented at the trial, and had not asked in cross-examination any questions tending to impute bad character to the prosecutor or any of his witnesses, nor to establish his own good character. At the conclusion of the case for the prosecution he handed in a statement containing the following sentences: "You can see the police evidence is false. . . . My last hard labour conviction was in 1914. I came out in October—the 30th—and joined the

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army on November 2nd, 1914, and done two years and four months in France and Italy. As for being absent from the army, you can see on my crime sheet was I kept going home to see my wife when she was bad. I have never had a chance, for I have always been the black sheep of the family."

[SHEARMAN J.: I always read such statements or have them read, and, if necessary, omit certain passages.]

Counsel for the prosecution thereupon obtained leave to cross-examine the prisoner on his previous convictions on the ground that he had imputed "lying false statements to witnesses for the prosecution," and proceeded to ask him questions to show that he had deserted eleven times from the army, had been sent to an industrial school, and had been to prison twice for bastardy arrears.

This cross-examination was not admissible by reason of s. 1 (f) of the Criminal Evidence Act, 1898. Merely to accuse a witness for the prosecution of lying is not sufficient: such witness must be accused of some misconduct independent of his evidence in the case. *J. Preston*, 1909, 1 K. B. 568; 78 L. J. K. B. 335; 73 J.P. 173; 25 T.L.R. 280; 2 Cr.App.R. 24: c.q. As regards the other exception recognised by the statute, the prisoner here gave evidence not of his good character, but evidence of his bad character. True, he said he had served in the army, but this is not challenged: he added that he had been guilty of serious misconduct during his service. Counsel for the prosecution suggested to the jury that he had been "a deserter," but in fact his charge sheet shows that he was convicted not as a deserter, but as "an absentee." As regards the questions concerning an industrial school, these must prejudice the jury, who, knowing he was now thirty-six years old, would be able to fix approximately the date when his career of crime began. Because the prisoner chooses to assert his own bad character, that is no reason why the prosecution should amplify and extend the details supplied by the prisoner. The bastardy charges were wholly irrelevant. Such a course of cross-examination is only permissible if the jury has been misled by the accused's statement on material points.

(He was stopped.)

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F. A. Wilshire for the Crown. Appellant, having been sworn, produced a written document and asked the Deputy-Clerk at Taunton to read it as his evidence. The Deputy-Clerk then read it to the jury. In it appellant said that he had been previously convicted and been sent to prison. He also said that the "police evidence was false." Further, he said that he joined the army three days after coming out of prison, on 2nd November, 1914, and had served two years and four months in France and Italy. I argued that his statement about the police involved an imputation on the character of the police witnesses of the prosecution, and that I was entitled to cross-examine the prisoner on his character by virtue of the Criminal Evidence Act, 1898, s. 1 (f). The case is distinguished from *Rouse and Burrell*, 1904, 1 K. B. 184; 73 L. J. K. B. 60; 68 J. P. 14; 20 Cox, C. C. 592; 20 T. L. R. 68: C. C. R.: c. q., where the defendant in cross-examination said that the police evidence was "a lie." This was said under the stress of cross-examination, but in this case it was a written statement made after committal from the police court and was a considered and deliberate statement. It meant that the police had deliberately invented it. This was an imputation on the character of witnesses.

By telling the jury of his service in the army he meant to create the impression that he had done his duty as a soldier. That was putting his character in issue, and I held I was therefore entitled to cross-examine to show that he had in fact been handed over eleven times at the Bristol police court as an absentee between 1915 and 1919.

I can find no authority to show that a statement may or may not be read out to a jury if so desired by the accused.

The LORD CHIEF JUSTICE: The words of s. 1 (f) of the Criminal Evidence Act, 1898, are: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless— . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character, or the nature or conduct of the

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defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

This appellant was charged with receiving a stolen coat and waistcoat. He handed in a document to the Court, probably prepared to be read in case of conviction. Before such a document is read out by the clerk it is right that someone should read it in the interests of the accused, as he may not be aware of the legal consequences to him of some of his statements. In this case he wrote that the evidence of the police was false and he referred to his length of service and good repute in the army. All this was read out by the Deputy-Clerk.

Now, whether evidence of military service is or is not evidence of good character depends on a careful examination of the circumstances of each case. Here the statement was treated as putting appellant's character in issue, and he was cross-examined not merely on his defaults during his military service, which made him an "absentee" (he was several times and inaccurately described as a "deserter"), but his past history also was traced back to an industrial school. Such a cross-examination ought not to have been permitted.

With regard to the only suggestion of an "imputation" within the sub-section, it has been repeatedly held in this Court that a mere emphatic denial of the case for the prosecution is not sufficient to warrant this kind of cross-examination.

The cross-examination was so irregular that the conviction cannot stand.

Conviction quashed.

RICHARD POMFRET.

Severity of sentence.

Appeal against sentence of three years' penal servitude for larceny passed by the Recorder at Sheffield City Sessions on January 3rd.

Appellant in person.

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RICHARD POMFRET.

Shearman J.

SHEARMAN J.: This is a case of difficulty. The appellant was convicted with others for stealing from a dray—a class of crime which seems to have been prevalent in Sheffield (and to have ceased to a great extent after the arrest of certain offenders). He has not a good character, and there was ample in his past career to warrant a long sentence. The learned Recorder had himself bound this man over in the hope of reclaiming him. Were it not for the frequency of this offence the sentence would have been lighter. We are in the same dilemma as the learned Recorder was. Every judge acts on the principle of not sending a man to penal servitude when a lighter sentence will act as a sufficient deterrent, but the prevalence of a specific crime in a particular place must be considered. In this case these principles clash somewhat: but, without any disrespect to the learned Recorder, we think we may set aside the penal servitude and reduce the sentence to one of twenty-one months' imprisonment with hard labour.

Sentence reduced.

H. C.

Mr. JUSTICE AVORY, Mr. JUSTICE SHEARMAN and Mr. JUSTICE BRANSON.

ROBERT SMITH.

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It is a ground for quashing a conviction, if the jury is directed that there is corroboration of an accomplice's evidence, when this Court thinks there is none. In dealing with the defence of an alibi, *the court of trial ought to direct the jury on any part of the period of time which is relevant.*

Appellant was convicted on January 11th, at the County of London Sessions, of larceny of several cases of tinned milk, and was sentenced by the learned Chairman to eighteen months' imprisonment with hard labour. Another man, Barnes, was convicted with him, and a third, Hallett, pleaded guilty and was the chief witness for the prosecution (before he was sentenced).

W. H. S. Truell for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The main ground of the appeal is that there was no corroboration of the accomplice's evidence in any material particular implicating the accused. Moreover, Hallett contradicted other witnesses for the prosecution, one, whose horses Hallett had borrowed (for the theft of the cases), deposing that Hallett came to him alone and not with appellant (who swore to the same effect), and another who heard Hallett invite appellant to have a ride with him in the van (in which the stolen goods were later found) from the public-house, where Hallett, Barnes and appellant had met, "as he was going his way": to this also appellant deposed: he had gone a little way and then got off. Hallett, however, maintained that appellant was in the conspiracy. Further, appellant proved an *alibi* from about 7 p.m. till 8.15 p.m. or 8.30 on the day of the theft, which must have taken place between 6.30 p.m. and 10.15 p.m. The learned Chairman did not fail to give the necessary caution about accomplices' evidence, but he told the jury *totidem verbis* that there was corroboration here. If that be so,

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the caution would do more harm than good, for it would strongly dispose the jury to accept the judge's statement as proof of the fact that there was corroboration. He said that the evidence that appellant had ridden on the van with Hallett shortly before the theft was corroboration. Nor did he point out that the accomplice flatly contradicted more than one other witness for the prosecution. What the Chairman called corroboration supported appellant more than it did the accomplice. "Evidence which is consistent with two views does not seem to me to be corroborative of either": *per* Lindley L.J., *In re Finch*, 23 Ch. D. at 277; 48 L. T. 129; 31 W. R. 526: 1883; so *per* Pickford J. in *D. Watson*, 8 Cr. App. R. at 253; 23 Cox, C. C. 543; 29 T. L. R. 450; 109 L. T. 335: 1913. Next, when the evidence of appellant's visit to another public-house at 7 p.m. was given the learned Chairman said: "This does not cover the period at all." But there was absolutely no evidence what *the* period—the actual hour of the theft—was: it might well have been "the critical time"; all that was known was that the stuff was safe at 6.30 p.m., and at 10.15 p.m. the van with it inside was found broken down some way off. He added that it would be useless to call other witnesses to show where appellant was at 8.30 p.m. This stultified the whole of the defence of an *alibi*: in summing up, this evidence was not so much as mentioned.

(He was stopped.)

D. Warde for the Crown.

AVORY J.: Without saying that in every case it is proper to sentence an accomplice pleading guilty before he gives evidence for the Crown, it is obvious that where he is not sentenced it is more than ever necessary to warn the jury about accepting his testimony, because, naturally, his object is to mitigate his own punishment. Here there was no evidence when the van—found at 9.45 p.m.—was loaded with the stolen property—at any rate, appellant was not there when it was found. He got on the van at 6.15 p.m., but the prosecution's own case was that Hallett invited him to do so as he was going his way, and he swore that he only went a little way on the van. The examination-in-chief of the accomplice was quite inadequate, and this

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had misled the learned Chairman: the "crucial" moment of the theft had never been ascertained, not even asked. This Court has always held that merely to warn a jury about necessary corroboration is not enough: if in fact there is none, it may quash a conviction. Moreover, the learned Chairman seems to have forgotten that Hallett absolutely denied that he had invited appellant to ride with him, and it was difficult to see why he had utterly rejected the evidence of appellant's *alibi* for part of the relevant time. This was unfortunate, for we now know, though the actual time of the theft was not brought out at the trial, that the period was from about 6.30 p.m. to 10.15 p.m.—any part of which might be relevant. The Court has no alternative but to quash this conviction.

Conviction quashed.

FREDERICK DEAN.

When prisoners are tried together the direction to the jury must carefully discriminate between the respective cases.

One of them inculpating another to exculpate himself is only in the position of an ordinary witness or in so far as he is defending himself.

In s. 10 (4) *of* 8 *Ed.* 7, *c.* 59, *the Prevention of Crime Act*, 1908, "*seven days*" *means seven clear days.* E. Turner, 3 *Cr. App. R.* 103 : 1909, *followed.*

Appellant was convicted, with two other men, at the Birmingham City Sessions, on January 9th, after a two days' trial, of housebreaking and knowingly receiving stolen property, and was sentenced by the Assistant Recorder to twenty-one months' imprisonment with hard labour. All the accused were undefended. Appellant had been allowed bail.

Sinclair Johnston for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present, asked leave to add grounds of appeal to those formulated by appellant himself.

Douglas Jenkins for the Crown, asked by the Court if he objected to this extension, did not object.

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Johnston. There were sixteen separate charges in fourteen different counts against the three men, but only four of the charges affected appellant, and these were finally reduced to two. Of the fifty or sixty articles stolen and recovered and exhibited in Court only two watches and a chain were found in appellant's possession: his case was that he bought them honestly from McCulloch, one of his co-defendants.

Evidence was given under the Larceny Act, 1916, s. 43 (1) (a), that property stolen within twelve months from six different houses had been found in the possession of the two other prisoners. Eighteen exhibits of the stolen property were put in comprising over fifty articles of jewellery. No evidence to connect any of the prisoners with any breaking and entering was given. The learned Assistant Recorder ruled that against the appellant there was only evidence on two counts in respect of receiving two watches and a chain. Evidence was given to prove his guilty knowledge, under s. 43 (1) (b) of the Larceny Act, 1916, to the effect that within five years he had been convicted of an offence involving dishonesty, viz., larceny. McCulloch, one of his fellow-prisoners, gave evidence to the effect that he had been given all the stolen property to sell by the appellant. The appellant did not give evidence, but from his very short statement in the dock and from his cross-examination of McCulloch (when the shorthand note is rightly read), it is possible to gather a connected defence, which was that he had had the three articles from McCulloch: that he knew (as was proved) that McCulloch was in business and had a shop: and that he did not know what class of shop it was. It did not appear whether he claimed to have been given the property by McCulloch or to have bought it from him: but he clearly disclaimed guilty knowledge. None of the prisoners were defended, and all were found guilty. The appellant's conviction should be quashed on three grounds.

First, the evidence of the previous conviction was wrongly admitted. Such fact "may not be proved unless seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given." Notice admittedly proper in form was served upon the appellant on the 31st December. The appellant pleaded and the jury were sworn in the case, though not charged, on the 7th January, but the case was then adjourned till the 8th January on account of the illness of one

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of the prisoners, and the whole of the hearing took place on the 8th January and subsequent days. Seven days in the section means seven clear days, from midnight to midnight. See *E. Turner,* 1910, 1 K. B. 346; 79 L. J. K. B. 184; 74 J. P. 81; 22 Cox, C. C. 319; 102 L. T. 400; 54 S. J. 164; 26 T. L. R. 142; 3 Cr. App. R. 103: c. q. The point of time from which the seven days are to be reckoned is not specified in the Act, but must be taken to be the first day of the assize or the finding of the bill by the Grand Jury. Knowledge and suitable notice at some period before trial would be necessary, or at least desirable to enable the person charged to get evidence in rebuttal during a period when he would, if on bail, have such leisure which he would not have during the hearing: also to enable him to decide as to his plea or as to his challenges to the panel. No actual hardship due to the one day's delay in serving is suggested in this case, and the point is admittedly purely technical.

[AVORY J.: When evidence of this nature is proposed to be tendered, of course the conditions, which alone make it admissible, must be most exactly and strictly fulfilled.]

Secondly, the evidence of McCulloch may have weighed heavily against the prisoner. The great number of the pieces of jewellery and of the separate breaking and entries of which they were the produce would be the most cogent argument for guilty knowledge. Apart from McCulloch's evidence, which connected the appellant with the whole fifty odd pieces, there was no evidence to connect him with more than three. McCulloch was an accomplice, and under the circumstances of this case the Assistant Recorder should have cautioned the jury as to the weight they should attach to his evidence. He gave no such caution at all. It cannot be denied that there was such corroboration of his evidence as was afforded by evidence of "recent possession."

Thirdly, the appellant did put forward a defence, or at least a connected story of what his defence was meant to be could be deduced from his statement taken with his cross-examination of McCulloch. He was undefended, and this defence should have been put before the jury in the summing-up, but was not. *Dinnick,* 3 Cr. App. R. 77; 74 J. P. 32; 26 T. L. R. 74: 1909: c. q.

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Douglas Jenkins. The pleas were taken on January 7th, the day the sessions began, but the trial did not actually commence till the 8th, owing to the illness of McCulloch: the jury had merely been sworn, but defendants had not been given in charge. Appellant was not taken by surprise, and had been on bail on the 7th. The date of the commencement of the trial is immaterial in this case, as the seven days ran until the evidence was given—following the words of the statute. The evidence of which notice was given was adduced on the 9th.

SHEARMAN J.: There is nothing in the point about the notice. We hold that the trial did not begin till January 8th, which was well within the "seven clear days" required by *E. Turner's* case, which we follow.

But the case as a whole was a most complex and difficult case, and the learned Assistant Recorder had to deal with three prisoners, one of whom was said to be a guilty person throwing the blame on the others. He, McCulloch, is only entitled to be considered as an ordinary witness on oath—as the Assistant Recorder said that he was—in so far as he is defending himself; but when in his position he gives evidence against others he is not entitled to be judged as any other witness: and on this point there was no direction to the jury and no warning that he was a suggested accomplice. Had it not been for this summing-up the jury might very well have convicted this appellant. Two prisoners had been in possession of property stolen within the last twelve months—but not this one, and evidence had properly been given of this against them. But there was no discrimination in appellant's favour. The appeal must be allowed.

Conviction quashed.

H. C.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE HORRIDGE AND MR. JUSTICE SHEARMAN.

ARTHUR TAYLOR OTHERWISE CHRISTOPHER SAUNDERS OTHERWISE WALLACE.

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The Court entirely approves of a court of trial dealing with all outstanding charges against a convicted prisoner, at his request, whenever it can legally do so.

The Court disapproves of the multiplication of indictments when the allegations can be conveniently made in one indictment.

Appellant pleaded guilty at Margate Sessions to housebreaking on January 12th, and was sentenced by the Recorder to three years' penal servitude, consecutive on a similar term he was then undergoing after sentence for similar offences passed by the learned Chairman at the County of London Sessions last December, when he pleaded guilty. He had escaped from custody before trial on the latter charges, but was arrested at Margate on November 22nd for housebreaking at Broadstairs, Southend and other places.

Appellant, in person, appealed against the second (consecutive) term. In his notice of appeal he stated that the learned Chairman had, at his request, "indirectly taken into consideration the Margate charges, which he had then admitted."

It appeared, however, from the shorthand report that the learned Recorder had not been distinctly informed that the learned Chairman had in fact taken this course at appellant's request and had strongly objected to his being arrested again or tried for the offences committed during the interval of his escape: that shorthand report was not before the learned Recorder, and counsel for the prosecution stated that according to a newspaper report the appellant had made the said request and it had been refused by the Chairman. The latter had suggested an adjournment till after a trial at Margate, but appellant objected.

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AVORY J.: The learned Chairman not only "indirectly," but directly took into account in his sentence the Margate charges. As he said, this Court has over and over again approved of the course he took in this case. The incident of the newspaper report shows the mischief of relying on some curtailed account in a newspaper. Naturally, the Recorder said, when he was so informed, "I cannot suppose that he did" (*i.e.*, take the Margate charges into account). He was in fact misled. It is absolutely clear that the learned Chairman did intend to dispose of the Kent charges, which were admitted. We adhere to our often expressed principle, and quash the second term of penal servitude in so far as it was consecutive and make it concurrent.

A point of practice arises here. There were three indictments at Margate, all for housebreaking in that neighbourhood. In the Indictments Act there is express authority to put into one indictment all charges of "the same character." When this is not done the costs are increased, and when it is improperly done the Court can disallow the costs thrown away (*a*).

Sentence varied and reduced.

TARGET TILLSON BIRCH.

The deposition of a witness at a trial contradicted by his evidence thereat cannot be put in as evidence against the accused.

A. White, 17 *Cr. App. R.* 60: 1922, *followed.*

Appellant was convicted on January 26th, at the Leicester Assizes, before Mr. Commissioner Finlay, K.C., of having carnal knowledge of a girl over thirteen and under sixteen years of age, his stepdaughter, and was sentenced to nine months' imprisonment with hard labour. The learned Commissioner had granted a certificate of appeal on the grounds, *inter alia*, that he doubted whether he had not improperly admitted evidence and whether he had correctly directed the jury on one point.

Norman Birkett for the appellant, who was not present. The gist of the case is that at the trial the girl swore positively that her

(*a*) The Court repeated this warning in *Felstead* alias *Day* on March 17th.

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stepfather had not touched her, whereas before the magistrates she had circumstantially charged him. Thereupon counsel for the Crown obtained leave to treat her as a hostile witness. (The first time in his experience, counsel observed, a prosecutrix in a sexual case had been so regarded.) From that point the learned Commissioner had persistently assumed—and told the jury—that the girl's deposition below—which was put to her—was evidence that accused had in fact committed the offence. At the trial she swore that what she had previously said "was all lies and I was put up to do it." Therefore, at the trial there was nothing to corroborate. Her aunt, who, it was agreed, was an unsatisfactory witness, swore that when she taxed appellant (after a letter from the girl, not produced) he said, "You'd have heard nothing about it if her periods had not stopped for some months." A doctor testified that she had had connection with someone during the weeks in question; and an uncle, a trustworthy witness, swore that when he spoke to appellant the latter first said, "It's all lies and tales," and later, "I'd be sorry if anything happened to the girl from what I've done." A good deal more might be said about the course of the trial, but counsel was content to rest his case (1) on there being no case to go to the jury at the end of the evidence for the Crown, and (2) on its being a clear misdirection to the jury to ask them to consider the girl's deposition below as evidence. He relied on *A. White*, 17 Cr. App. R. 60: 1922, and the cases therein cited.

Wightman Powers for the Crown. I was taken by surprise at the trial. Defendant did not go into the box and the learned Commissioner did not comment on his absence. Here there was an admission to the uncle as well as to the aunt, and that entitled the judge to deal with the facts stated in the deposition, and to call attention to the fact that contradictory evidence of what she said now was given by her at the police court. This is implied by the proviso to s. 5 of 28-9 Vict. c. 18, "Denman's" Act, 1865: "It shall be competent for the judge at any time during the trial to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit." I submit that this entitles him to use the deposition as evidence at his discretion: the matter is left to his discretion.

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[HORRIDGE J.: He is not entitled to tell the jury that they can act on it as evidence. Sect. 3 of Denman's Act begins: "A party producing a witness shall not be allowed to impeach his credit, &c.," and the prohibition of "impeaching" governs the whole of the section.

AVORY J.: It is only evidence that the witness is a liar. "Such use" in s. 5 means, of course, such proper use as he may think fit. It does not entitle the judge to rule that the deposition is evidence against the person on trial.]

The judge cannot rule that the deposition by itself is evidence, but where there is other evidence he may use it. *J. Williams,* 77 J. P. 240; 29 T. L. R. 188; 8 Cr. App. R. 133: 1913, is the only case in this Court relating to a deposition, and in that case Channell J. left to the jury the witness's statement in her deposition along with her contrary statement in the box. All the other cases cited are of statements made in the absence of the accused and not on oath—a very different matter. In *A. White* the Lord Chief Justice seems to attach weight to the fact that the statement in *Williams* was sworn.

[SHEARMAN J.: But see the passages by Lord Denman C. J., and Bailey J. in *Wright* v. *Beckett,* 1 M. & Rob. 414: 1834, and *Ewer* v. *Ambrose,* 3 B. & C. 746; 5 D. & R. 629: 1825, respectively, both quoted at 8 Cr. App. R. 137.]

Possibly they refer to statements made in the absence of the prisoner. You ought to leave both statements to the jury.

AVORY J.: The learned Commissioner correctly directed the jury on the question of corroboration. It is true that there was some sort of corroboration, and if the uncle's evidence was believed, an admission, but it is also clear that the slightest change in the order of the reported words of that admission might make all the difference. But despite the alleged admission and the doctor's evidence, the main question was: Is there any evidence of the girl's which calls for corroboration? Apart from her evidence, that of the uncle would not justify a conviction. The last words of s. 5 of Denman's Act mean, *e.g.*, that the

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judge may call attention to other parts of the statement to which no reference has been made. Apart from authority, the general position here was that the chief witness for the Crown could not be believed on oath. Of course, there might be enough other evidence to justify a conviction. Was there here? The confusion arose from supposing that depositions in the Court below are *per se* evidence at the trial: they are not. You cannot leave a jury to act on a statement which the witness herself says is untrue. Therefore, apart from authority, the direction in this case was incorrect. But there is authority. *A. White* may be distinguished from *Dibble*, 72 J.P. 498; 1 Cr. App. R. 155: 1908: c.q., because the former statement (*White*) was not on oath; but the principle is the same in both cases. In *J. Williams* the statement was on oath: see *per* Alverstone L. C. J., at pp. 136 and 140 of 8 Cr. App. R.

There was clearly misdirection: indeed, the learned Commissioner had himself doubt on the point; and it certainly cannot be said that if this evidence had been excluded the jury must have come to the same conclusion.

Conviction quashed.

Solicitors for Appellant—*H. Simpson & Bennett,* Leicester.

GEORGE MOORE.

On a trial for larceny as a bailee there must be a direction on the point whether the conversion was fraudulent or not.

An accused person must be asked whether he wishes to give evidence on oath or call witnesses.

Appellant was convicted at the Staffordshire Sessions, on February 5th, of larceny, and sentenced by the Deputy-Chairman to three years' penal servitude. There were three indictments against him: one for obtaining by false pretences, of which he was acquitted; on the second he was convicted; the third, also for larceny, was untried.

E. A. Godson for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. He was undefended at the

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trial. It must be admitted that there was evidence on which the jury could convict. The real issue was whether appellant *fraudulently* pledged a watch given to him to repair or innocently. Part of s. 1 (1) of 6 & 7 Geo. 5, c. 50, the Larceny Act, 1916, refers to the "intent . . . permanently to deprive the owner" of his property, and continues: ". . . a person may be guilty of stealing . . . notwithstanding that he has lawful possession thereof, if, being a bailee . . . he fraudulently converts the same to his own use. . . ." There is a great difference between "converting" and "fraudulently converting": *Wynn*, 16 Cox, C.C. 231; Cr. App. R.: 1887, *per* Pollock B. The direction to the jury was vitally defective in that it ignored this distinction. So far from there being evidence that he intended to deprive the owner of his watch permanently, it was proved that he went with the money to redeem it, not knowing that then there was a warrant out in respect of it. This defence was never even put to the jury: *Dinnick*, 74 J.P. 32; 26 T.L.R. 74; 3 Cr. App. R. 77: 1909: c.q.; and moreover, he was never asked whether he wished to give evidence or call witnesses.

[HORRIDGE J.: That is not necessarily fatal to a conviction, but must be taken into consideration.]

K. Berrington for the Crown. It is true that the word "fraudulently" does not occur in the summing-up, but the distinction was essentially explained to the jury; the real question was: did appellant intend to return the watch? The facts point strongly to fraud. The watch was pledged the very day it was obtained and appellant spoke of it as "*my* English lever."

Though he was not invited to give evidence on oath, he had every opportunity of stating his case.

HORRIDGE J.: The total omission of any reference to fraud in explaining s. 1 (1) of the Larceny Act prevents this conviction standing. Again, a defendant must be invited to give evidence and to call witnesses. There is still an indictment to be tried, and the order of the Court is in the form of that in *Sovosky*, 1 Cr. App. R. 100: 1908: that appellant be remanded in custody till that indictment be tried.

Conviction quashed.

JAMES THOMPSON AND ROBERT THOMPSON.

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It is a sufficient user of an office within ss. 1 *and* 3 *of the Betting Act*, 1853, 16-17 *Vict. c.* 119, *if the clerical work, the accounts and the records of ready money betting transactions, is done there.*

Appeals against convictions on certificates.

Appellants, who were not in custody, were jointly convicted at the Northumberland Sessions, on January 3rd, of using a room for betting, and were each fined £50 and ordered to pay one-fourth of the costs of prosecution.

The relevant facts sufficiently appear from the judgment.

G. F. L. Mortimer, K.C. (with him *Mundahl*), for appellants. Betting, as such, even the so-called ready money betting, is not *per se* an offence; it is only where dealings are "localised" to some office or place that they become illegal. The user of a room for the payment of bets made elsewhere, for deposit of money received in respect of bets, or for making up accounts of bets previously made does not amount to an offence. *Davis* v. *Stephenson*, 24 Q. B. D. 529; 59 L. J. M. C. 73; 62 L. T. 436; 38 W. R. 492; 17 Cox, C. C. 73; 54 J. P. 565: 1890; *Bradford* v. *Dawson*, 1897, 1 Q. B. 307; 66 L. J. Q. B. 191; 76 L. T. 54; 45 W. R. 347; 18 Cox, C. C. 473; 61 J. P. 134. Carrying on a ready-money betting business involves four things: (1) making the bet; (2) receiving the deposit; (3) paying the winnings; and (4) taking an account of dealings. It is only the second of these matters which is struck at by the Betting Act of 1853. Apart from "resorting," which does not arise here, s. 1 of that Act prohibits the user of a room for the purpose of money being received as a deposit for a bet, but does not otherwise prohibit such user for the carrying on of a betting business.

In order to constitute such an offence there must be something done at the room causing or facilitating the receipt of the deposit; acts done "for the purpose of money being received" must precede the receipt which is the result of them. Acts done, such as the keeping of accounts of bets already made, do not precede, but follow the receipt of money. See *Stoddart* v. *Hawke*, 1902, 1 K. B. 353, *per* Lord Alverstone, at pp. 358 and 359; 71 L. J. K. B. 133; 85 L. T. 687; 50 W. R. 93; 66 J. P. 68; 18 T. L. R. 23; *Lennox* v. *Stoddart*, 1902, 21; *Mac-*

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kenzie v. *Hawke*, 1902, 2 K. B. 216; 71 L. J. K. B. 561; 87 L. T. 122; 66 J. P. 696; 18 T. L. R. 550. In all the coupon cases the offices were used for the issue of coupons or newspapers, without which the deposits could not have been received.

Thorpe, for the Crown, was not called upon.

AVORY J. (*a*): The appellants in this case, who are father and son, were charged with offences under ss. 1 and 3 of the Betting Act of 1853, which is known as an Act for the Suppression of Betting Houses, and it is important to observe that the preamble of this Act, to which attention has more than once been called, clearly contemplates two different kinds of mischiefs which are aimed at by the Legislature, and both those mischiefs are in the enacting sections dealt with as separate offences: ss. 1 and 3. The preamble is: "Whereas a kind of gaming has of late sprung up tending to the injury and demoralisation of improvident persons by the opening of places called betting houses or offices and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies . . . ." Then: "For the suppression thereof be it enacted . . . ." Then it proceeds to enact: That if any person shall use an office either for the purpose of betting with persons resorting thereto, or for the purpose of money being received in advance as the consideration for a promise to pay thereafter on events relating to horse-races, &c. . . . Then in each case persons so offending shall be liable to the penalties of the statute.

Now the indictment in this case was framed under both branches of the section, and there was evidence given on behalf of the prosecution which, if it had not been explained, might have established a case against the appellants under the first branch of the section. There was evidence given by the police officers and others who were watching that persons were seen resorting to these premises, but after the evidence given on behalf of the defendants, who were then upon their trial, the learned Chairman very properly advised the

(*a*) This judgment is printed *verbatim* from a transcript of the shorthand report supplied by the courtesy of the Director of Public Prosecutions.

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jury to disregard those charges under the first part of the section, as it appeared to be consistent with the evidence that the only persons who had been seen using the premises were the two appellants and their clerks, and, in a careful and lucid summing-up, the learned Chairman proceeded to direct the jury that they should confine their attention to the charges under the second part of the section, namely, that this office was used by these persons for the purpose of money being received by them in advance as the consideration for the promise on their part to pay thereafter money on events relating to horse-races. The learned Chairman not only read the section to the jury, but he, in the course of his summing-up, said this: "This is a system" (he means the present system which they were inquiring into) "of having a central office from which emanates a large number of agents and touts who go into villages and into industrial centres—into shipyards and factories and other places, even where girls work. Sometimes women, I am sorry to say, go round at the dinner hour and enter into ready-money bookmaking. The police have found it difficult to stop the practice. . . . What happens in this particular kind of case is this: this is not a dwelling-house where this man lived: it is an office fitted up as we have heard with all the necessary paraphernalia for a ready-money bookmaking office. It is probably true that people do not go for the purpose of betting. . . . The large number of slips coming in from different places have to be opened out and dealt with according to the results of race or races concerned. They have carried that on themselves, and I do not myself see a very great deal of difference between sending out—I do not wish to express any opinion about the morality of gambling at all, but I do want to say this: That I see very little difference between sending out a large number of coupons to be filled up and sent in and sending out a large number of agents, runners and people of that sort to go round among the population and collect their money. And therefore I want to say this: that if you think that it has been satisfactorily proved that that was the course of business and that money was received in advance—that it was not a credit business, but that money was paid in advance—you have heard the evidence with regard to the Cesarewitch and the Cambridge—you have heard the witnesses themselves (the two principals) say that it was a ready-money business, and if you

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are satisfied that that was so, then you will be perfectly entitled to find these men guilty on the second indictment"—(he means on the second count) the other counts—"that is, that they used the room for the receipt of money in respect to bets on the second, fourth, sixth, eighth and twelfth counts." When he says "in respect to bets," that has been criticised by Mr. Mortimer, but it is obvious, looking at the rest of the summing-up, that the jury understood that to mean: Were they using this room for the receipt of money in advance in respect to their promises to pay thereafter within the terms of the second branch of the section?

The learned Chairman, in that direction to the jury, clearly had in his mind the decisions of the Divisional Court and of the Court of Appeal in the various *Stoddart* cases which have been referred to, and the result of those cases may be shortly stated in this way: Lord Justice Vaughan Williams in the case of *Lennox* v. *Stoddart* used the expression that the issuing of the coupons was a material and necessary step for the purpose of the receipt of the money. Other cases then followed that have used the expression, that if the office is used for "an essential part" of the business which is forbidden by the statute, then that is sufficient to bring the person so using it within the terms of the statute; in other words, in this case the question resolves itself into this: Was this office used by these appellants for any essential part of the business of receiving money in advance on their promise to pay money on events of horse-races, &c.?

Now there are certain matters which appear to us conclusively to bring the case within that definition. One of the appellants was asked this in cross-examination: "Your office is the centre of a large ready-money business and the slips are brought to the office?—A. Sent by train. Q. But the books are kept there?—A. Yes. Q. All records are kept there?—A. Yes." Then: "Q. Calculations as to payments are made there"—and it is put to him—"and without that office you could not carry on the business?" (That is the ready-money business.) His answer is: "Not very well," and that answer coming from one of the appellants might reasonably be understood by the jury to mean: "Not at all." Later, the question is put to him: "Q. You employ a large staff of collectors all over the Blyth district and they make ready-money bets on behalf of you and

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your son?—A. That's right. Q. They secure money on behalf of you and your son, and you could not carry on the business unless you had an office at Blyth?—A. Quite true." The other appellant was asked about money that was found upon him at the time when the police visited the premises—a sum of £20 was found upon him, and he was asked: "Q. Where had you received that money?" he says: "A. I received it at the different places I had been to—Choppington, Ashington, and so on—on Sunday," and he is asked: "It had been collected in the course of your round at Choppington and so on?" which means the round which he went to collect the money from the agents who had made these ready-money bets and accepted and received the money in advance. "Q. You collected money from your agents and brought it back to Blyth?—A. Yes. Q. You took it into the house with you?—A. Where could I put it?" In other words: "Where else could I put it?" And in the course of the interesting and valuable argument we have listened to from his counsel he admitted that this office was used for the purpose, among others, of carrying on this ready-money betting business; in other words, for the purpose of receiving money in advance by the hands of their agents, which is the same as if they received it themselves in advance as a consideration for their promise to pay money thereafter on events of horse-races, &c.

In these circumstances, we are of opinion that there was ample evidence here upon which the jury could, under this direction of the learned Chairman, find that the offence had been committed under the second branch of this section. And with regard to the summing-up I think I have already indicated, notwithstanding the criticisms which have been addressed to it, when it is regarded as a whole, and as it must have been understood by the jury as a whole, we think there is no fault to be found with it, but that, on the contrary, it does great credit to the learned Chairman.

In these circumstances the appeal must be dismissed.

Appeal dismissed.

Solicitor for the Appellants—*F. J. Lambert,* Gateshead.

H. C.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE HORRIDGE AND MR. JUSTICE SANKEY.

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JOHN WILLIAM HIBBERT.

If an appellant breaks a recognisance entered into before this Court it will, on a further conviction, deal with him although the Court below may have dealt with him.

See 17 Cr. App. R. 170: 1923. The appeal there recorded came up "for further consideration."

On October 15th, 1923, this Court bound over the appellant in his own recognisances "to be of good behaviour, &c.," and to obey a nominated probation officer. On January 17th, 1924, he was convicted at the Rochester City Sessions of larceny and was bound over in his own recognisances. He now appeared before this Court to answer the charge of having broken his recognisances entered into before this Court on October 15th last.

The Court examined *James Bray,* the appointed probation officer. He attributed the obligor's unemployment partly to a serious accident to his finger, but was not satisfied with his application to work generally, though there was no suggestion of dishonesty against him other than that dealt with on January 17th. Employment was open to him.

The Court bound him over on his own recognisance in the sum of five pounds "to be of good behaviour" for two years, and to go into the employment offered, or any other, and to remain there as long as he is not dismissed, and to obey the probation officer, who is to report to the Court.

JAMES VIVIAN.

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3 *March.*

When defendants are tried together, discrimination in the respective sentences must be founded in good reason.

Appeal against sentence by leave of the Court.

Appellant was convicted, after previous convictions, at the Central Criminal Court, on January 18th, of knowingly receiving stolen property, and was sentenced by the Recorder to four years' penal servitude. Another man, Dawson, was convicted with him and sentenced to eighteen months' imprisonment with hard labour and to deportation to the United States.

Appellant in person.

The Court thought that there was little to choose between the cases of the two prisoners, and reduced the sentence to twenty-one months' imprisonment with hard labour.

Sentence reduced.

MICHAEL MOSCOVITCH.

A judge cannot exclude a child-witness from the box on the ground that the case is unfit for him or her to be concerned in: his power is limited to the usual enquiry about the child's understanding of an oath or of the duty of telling the truth.

The Court may proprio motu *reduce a sentence.*

Appeal against conviction on certificate.

Appellant was convicted on February 4th, at the Salford Borough Sessions, of indecent assault on a married woman, and was sentenced by the learned Recorder to twelve months' imprisonment in the second division.

Butlin for the appellant, who was present.

W. Gorman for the Crown was not called upon.

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Only two points call for notice.

The prosecution tendered as a witness the daughter, nine years old, of the woman in question, but the learned Recorder thought that she was immature (*a*) and "too young to give evidence in such a case," and did not even ask her whether she understood the nature of an oath or appreciated the duty of telling the truth, though she had given evidence on oath before the magistrate. The Court regarded at least one statement in her deposition as important.

The Court invited appellant's counsel to ask leave to appeal against sentence.

HORRIDGE J. (after dealing with the case at large): It was a misfortune that the daughter was not called. Apparently the learned Recorder thought that it was not a fit case in which a child should give evidence, but that was not the question, which, on the contrary, was whether or not the child knew the nature of an oath.

Appellant is a man of fifty-eight who has been married for over thirty years and brought up a large family, and there has never been any other misconduct alleged against him. The sentence will, therefore, be reduced to six months' imprisonment in the second division.

Sentence reduced.

(*a*) The shorthand note reads:

Annie Evans called.

THE RECORDER: Are we going to have this little girl in the box?

Q. How old are you?—*A.* Nine.

Q. Where do you go to school?—*A.* St. Matthew's.

Q. Are you always home with mamma when you are not at school?—*A.* Yes.

Q. When you do not tell the truth, what is going to happen to you?—*A.* Pardon.

THE RECORDER: I do not think so, Mr. Gorman. I do not think we can act on the evidence of a young girl like that in a case of this kind.

Mr. Gorman: It fixes where——

THE RECORDER: I realise what it does, Mr. Gorman. That is for me to determine, and I do not think a witness of that tender age can be of any use in a case like this. When I read the depositions, I thought it would be a more mature child, and even then I should hesitate.

The child left the box.

CHARLES DENNIS AND HENRY WALTER PARKER.

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3 *March.*

Defendants not jointly indicted cannot be tried together by consent: Brett and Another, 3 *Cox C. C.* 79: 1848, *overruled;* Crane, 15 *Cr. App. R.* 23: 1920, *followed.*

The Court will take the point that there has been no jurisdiction if it is not taken by the parties.

Appeals against conviction, and by Dennis against sentence.

Appellants, who were not in custody, were convicted on January 10th, at the Tewkesbury Borough Sessions, of respectively using and keeping a house as a betting-house and were each fined, by the learned Recorder, ten pounds, and the former to pay the costs of the prosecution.

Earengey for the appellants.

A. F. Clements for the respondents, the police authorities of Gloucestershire.

Earengey opened the appeal on the merits.

He was asked by the Court why two defendants who were not jointly indicted were tried together.

Earengey. By arrangement with my learned friend. It was understood that the learned Recorder was aware of our agreement and approved. My authority is *Brett* and *Parish,* 3 Cox, C. C. 79: 1848.

[AVORY J.: If that case is exhumed, the sooner it is reinterred the better. In fact it was cremated by *Crane,* 1921, 2 A. C. 299; 90 L. J. K. B. 1160; 125 L. T. 642; 85 J. P. 245; 65 S. J. 642; 37 T. L. R. 788; 15 Cr. App. R. 23, 183.]

If *Brett* is wrong, the whole proceeding was a nullity. The only difference between that case and this is that there the judge certainly knew that there were separate indictments.

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AVORY J.

[AVORY J.: Can you produce any other authority for giving the court of trial jurisdiction by consent?]

No.

Clements. If the proceeding was a nullity, this Court is not bound to take the point, and both parties want the points of *law* arising settled here.

AVORY J.: The Court cannot accede to that doctrine. It was this Court took the point in *Crane*. It is bound to take notice of a manifest want of jurisdiction. Consent cannot give it. An irregularity may be waived by consent, but not a want of jurisdiction. There must be a proper trial: the recognisances of the appellants will be enlarged.

Venire de novo *awarded*.

Solicitors for Appellants—*Lionel Lane*, Gloucester; *S. Baker*, Tewkesbury.

Solicitors for Respondents—*Wellington, Clifford & Matthews*, Gloucester.

H. C

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SANKEY.

WILLIAM RICHARD FINNEY.

1924
17 *March.*

On a plea of guilty there must be legal proof of any previous convictions given in evidence, and no deposition of a witness, absent through illness, should be put in if all the statutory requirements in such a case have not been fulfilled.

Applicant pleaded guilty on February 12th, at the Stoke Borough Sessions, to two burglaries, and was sentenced to two (concurrent) terms of three years' penal servitude. He applied for leave to appeal against conviction and sentence. He was not present.

The Lord Chief Justice remarked upon the fact that, with one exception, applicant's previous convictions were mentioned to the Court below without any proof, and that there was no other evidence about his character. It was always desirable that there should be some such evidence. Moreover the deposition of a witness was admitted on the mere statement that he was too ill to attend. That was not sufficient. It must be proved that the witness was too ill to travel, that the deposition was taken in the presence of the accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness.

Application dismissed.

H. C.

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24 *March.*

LEWIS DAVID BAILEY.

When an indictment contains many counts dealing with many particulars the jury should be directed to return a verdict on each count, and they should be distinctly warned against supplementing evidence on any one by evidence on any other.

Appellant was convicted on February 5th, 1924, at the Monmouth Assizes of indecent assault on boys, and was sentenced by Rowlatt J. to fifteen months' imprisonment with hard labour.

S. R. C. Rosanquet for appellant, who was present. The appellant was charged on an indictment which contained nineteen counts. In sixteen counts he was charged with indecent assaults on sixteen different boys, whose ages ranged from 10 to 13 years. The remaining three counts charged him with committing acts of gross indecency with three of the sixteen boys. He was acquitted on the counts alleging gross indecency, but was convicted on the counts alleging indecent assault. It is submitted that that conviction is unsatisfactory. The judge should have directed the jury to consider each count separately, and to return a separate verdict on each count. No such direction was given, and a general verdict of "guilty on all counts" was returned. As Blackburn J. said in *Latham* v. *The Queen*, 5 B. & S. 643: 1864, "Each count is in fact and theory a separate indictment." That proposition is particularly true where, as here, each count charges a separate and distinct offence regarding a separate and distinct person, and should be treated separately and distinctly. In *G. W. Norman*, 1915, 1 K. B. 341; 84 L. J. K. B. 440; 24 Cox, C. C. 681; 112 L. T. 784; 79 J. P. 221; 11 Cr. App. R. 58, the Court held that where there were several counts and several transactions the counts should be dealt with separately, owing to difficulties regarding the admissibility of evidence, and the consideration by the jury of their verdict. In the present case this has actually led to defendant being found guilty on a count on which no evidence at all was offered. The judge also failed to direct the jury regarding the corroboration of the boys' evidence, and did not sufficiently warn them that corroboration was necessary. There was in fact no corroboration in the majority of the counts of the evidence of the boys.

[He was stopped.]

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LEWIS DAVID BAILEY.

Hewart L.C.J.
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Hon. Sir Reginald Coventry, K.C. (with him *J. H. Thorpe*) for the Crown. The course followed in this case has been followed in innumerable cases. It was foreshadowed at the beginning of the trial that the defence was that the case for the Crown was founded on a conspiracy on the part of the boys, and if each count had been tried separately it would therefore have been permissible for the Crown to put all the boys into the witness-box to show that they were honest boys. The judge asked the jury to regard the case as a whole, and to say whether or not the boys were conspirators. It is admitted that the evidence of one boy, regarding whom the appellant was charged in one count, could not corroborate the evidence of another boy on another count, but the evidence of one boy could show the consistency of the evidence of another. There was, in fact, corroboration in four charges of indecency, and the jury, in acquitting of the gross indecency which was not corroborated, would appear to have appreciated the judge's direction on corroboration.

The LORD CHIEF JUSTICE (*a*): This appellant, Lewis David Bailey, was convicted at the assizes at Monmouth of indecent assaults on certain boys, and in the result was sentenced to fifteen months' imprisonment with hard labour. He now appeals by leave against that conviction.

The indictment contained nineteen counts. Sixteen of those counts had to do with indecent assaults on sixteen boys, whose ages ranged from thirteen to ten years. The remaining three counts—count 1, count 4 and count 6—were for acts of gross indecency with three of those boys, but upon those three counts the jury acquitted the appellant.

The grounds upon which Mr. Bosanquet has founded the appeal against this conviction are four: first, that in such a case as this it was essential to direct the jury that each count should be separately considered upon its own merits; secondly, that upon the question of corroboration there was misdirection, or such a failure of direction as to amount to misdirection; thirdly, that

(*a*) This judgment is printed from a transcript of the shorthand report supplied by the courtesy of the Director of Public Prosecutions.

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LEWIS DAVID BAILEY.

Hewart L.C.J.

the jury ought to have been directed that in at least the greater number of the cases there was an absence of corroboration; and that, fourthly, the general verdict, taken in the circumstances in which it was taken, cannot be upheld.

It is not necessary that I should review in any detail the circumstances of this most odious and repulsive case, which must have greatly shocked everyone concerned in the course of the investigation at the Monmouth Assizes. I do not wonder that both judge and jury should have been willing, if they could, to find a concise way of dealing with this mass of filth. But the question for this Court is whether the verdict can stand.

The general rule where there are many charges against a person is not inadequately or inaccurately stated in the passage referred to in argument, at page 59 of the current edition of Archbold: "Though not illegal, it is hardly fair to put a man upon his trial upon an indictment containing forty counts, involving several distinct charges of false pretences, for it would be almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given upon the others." The risk, the danger, the logical fallacy is indeed quite manifest to those who are in the habit of thinking about such matters. It is so easy to derive from a series of unsatisfactory accusations, if there are enough of them, an accusation which at least appears satisfactory. It is so easy to collect from a mass of ingredients, not one of which is sufficient, a totality which will appear to supply what is missing. But of course that is only another way of saying that when a person is dealing with a considerable mass of facts, in particular if those facts are of such a nature as to invite reprobation, nothing is easier than confusion of mind; and, therefore, if such charges are to be brought in a mass, it becomes essential that the method upon which guilt is to be ascertained should be stated with punctilious exactness. But what was it that happened here? This appellant was a headmaster of a certain school, as to whom the evidence is that he had made himself in various ways unpopular—undeservedly unpopular—not only with the boys, but with some of the parents. The evidence was that this appellant, fifty-three years of age, a certificated teacher since about 1892, and having always borne, apart from this matter, an excellent character, had made a series of assaults upon schoolboys—indecent

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assaults and acts of gross indecency, and in the presence of other boys.

On the first three of those counts, which were charges of gross indecency, the appellant was acquitted. But upon the rest of the counts, taken in bulk, he was convicted; and when one looks at the summing-up, repulsive as no doubt it was to deal with this mass of material of this particular kind, not only is it not the case that the jury were invited and directed to consider each charge by itself, but there are undoubtedly passages to which attention has been called where it seems to have been conveyed to the jury that they might judge the part from the whole, and that they might reinforce the weakness of any particular part by looking at what appears at any rate to be the combined strength of the whole.

It is said that no objection was taken to the trying of the appellant upon all these counts taken together. That may be, and it might well have been the case that, if objection *had* been taken by counsel for the appellant, the prosecution in such a case as this would have been put to their election, and they would have been asked to proceed on certain charges, at least omitting for the moment the rest of the charges.

No such course as that was taken. The evidence was offered with reference to the indictment as a whole, and it was with reference to the indictment as a whole that at the conclusion of the trial the learned judge was called upon to direct the jury. It was not merely a difficult, it was a profoundly repulsive task, and one can well imagine the kind of way in which this case came to be dealt with according to the method upon which it *was* dealt with. If in the arguments which have been adduced before us the learned counsel for the Crown had said that while this summing-up was difficult to support in all respects, nevertheless it was apparent upon a close examination of the evidence that there were particular counts upon which, given an unexceptionable summing-up, the jury must inevitably have come to the same conclusion, that argument must no doubt have given rise to serious consideration. No such argument has been addressed to this Court. On the contrary, it has been expressly said more than once that no distinction is to be drawn between one count and another, and that it is right and proper that in weighing the merits, or, it may be, the demerits, of the evidence, with refer-

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ence to any particular charge, the jury should bring into the scale, by way, if need be, of make-weight, whatever was to be collected from the evidence upon any other charge.

Now that is a proposition which, in the opinion of this Court, cannot be sustained. So far is that from being the true conception of the law, that in such a case as this not only was it right that a careful distinction should be drawn between each count and every other count, but also, in view of the source from which the evidence came, it was right that a particular warning should be addressed to the members of the jury.

Reference has been made to the case of *Cratchley*, reported in 9 Criminal Appeal Cases, page 232. In that case the Lord Chief Justice, at page 235, used these words: "In our view there ought in such cases to be a warning by the judge, and it ought to be brought home to the minds of the jury, that they must act on evidence of this character with extreme care. In such cases it is generally desirable, apart from any rule of law and whether the witnesses are accomplices or not, that a warning should be given to the jury about acting on the evidence of boys of this age."

In the present case that course was not taken, nor in the present case were the jury directed to weigh, and to weigh with care, the evidence with reference to each particular charge, being careful not to fall into the error of supplementing the evidence on any one charge by what might erroneously be conceived to be helpful evidence upon some other charge.

It is said on the part of the Crown that, after all, this was evidence proceeding from boys at the same school, and that the unity of the school provided a *nexus* which made the evidence upon any count available upon any other count. It is a little difficult to follow that reasoning. One would have thought, on the contrary, that the very fact that this evidence *did* come from boys of the same school, especially if, as was urged in evidence, the master of that school was unpopular alike with boys and with parents, that circumstance in itself might have provided ground for additional caution and a stronger warning.

This Court has to deal with the evidence as it is in the course which was followed at the trial, and, to leave out the other matters upon which Mr. Bosanquet has addressed us on behalf of the appellant, it appears sufficient to say that upon his last ground,

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namely, that this general verdict, taken in these circumstances, and upon this direction, cannot be supported, the appellant is entitled to succeed.

The consequence follows that this appeal is allowed, and this conviction is quashed.

Conviction quashed.

FRANCIS WILSON BOOKER.

The Judges' Rules for the guidance of the Police discussed.

Appellant was convicted, on February 27th, at Manchester Assizes, before Greer J., of the wilful murder of Percy Sharpe, a boy of fourteen, and was sentenced to death.

Only one point calls for report.

Appellant was convicted entirely upon circumstantial evidence, an important part of which was that upon the appellant being arrested four months after the murder upon another charge, and his lodgings and greenhouse being searched, the knickers, braces, pocket-book and Labour Exchange card belonging to the murdered boy were found hidden in various places at his lodgings and in his greenhouse. These and other articles were placed in a room at a police station and appellant was taken to it in custody, whereupon a police officer administered a caution to the following effect: "I am a police officer. The articles I am about to show you were found at your lodgings and in the greenhouse on your allotment. Do you wish to say anything with regard to them? You are not obliged to say anything, but if you do say anything it will be taken down in writing and may be given in evidence."

Thereupon the police officer pointed out the articles one by one to the appellant, who made some statement with regard to each, and these statements were taken down in writing and read over to him.

The police officer stated that at the time that he cautioned the appellant he had not made up his mind to charge him with murder.

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There was no mention of the murder until the police officer had already shown some of the articles to the appellant and then pointed out the knickers, saying, "These knickers have been identified as belonging to the boy Percy Sharpe, who was murdered in Carr's Wood on September 4th, 1923."

Kenneth Burke, for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. This evidence was wrongly admitted. Rule 3 of the Rules approved by His Majesty's judges as to questions to prisoners by police constables, "Persons in custody should not be questioned without the usual caution being first administered," means that if the prisoner is already in custody on one charge he should not be questioned with reference to a possible fresh charge without first being told that he may be charged with that fresh charge. Otherwise he may think that the questions are put with reference to the original charge, and consequently may refrain from giving answers which would establish his innocence on the possible fresh charge for fear of prejudicing his defence on the original charge.

Also statements by the deceased were wrongly admitted as dying declarations.

E. W. Wingate-Saul, K.C. (with him *Milner Helme*), for the Crown, was not called upon.

In the course of delivering judgment, the LORD CHIEF JUSTICE said: After the appellant had been arrested on another charge there was found in and about the place where he lived a quantity of things, including portions of clothing, which had belonged to the boy Sharpe. These articles were collected, and Superintendent Tongue, of the Manchester City Police, went to the police station where the appellant was detained. He told him that he was a police officer, and said: "I now desire to show you certain articles which have been found in your lodgings and on your allotment. You need not give any explanation unless you desire to do so. Should you give any explanation in respect of any or all of them you are at liberty to do so, but whatever you do say will be taken down in writing and may be given in evidence." The superintendent said that when he put that caution he had not made up his mind to charge the appellant at that

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moment. The appellant went on to make various statements, which were given by the police in evidence.

The Rules approved by His Majesty's judges (*a*) which relate to such matters are set out in Archbold's Criminal Pleading, Evidence and Practice (26th ed.), p. 390. They direct the procedure to be followed when police officers take or receive statements from persons suspected of guilt of crimes or in custody. When these Rules are regarded it is impossible to say that what Superintendent Tongue did here was contrary to any of them. It has been said that he suspected the appellant of being guilty of the murder of the boy and that he intended to charge him with the crime whether he gave an explanation or not. That is not quite an accurate statement of what the superintendent said; he said that he did not then intend to charge the appellant, but that if he had failed to get an answer to the questions which he was putting he might charge him. The appellant was undoubtedly then a suspected person. Rule 1 states: "Where a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained." But it is said that not only was he a suspected person, but that he was at that time also in custody, although not on the charge of murdering the boy Sharpe, and that, therefore, Rule 3 and not Rule 1 applies. Rule 3 provides: "Persons in custody shall not be questioned without the usual caution being first administered." The superintendent here gave the caution which I have mentioned. In these circumstances the Court is of opinion that this argument fails.

Appeal dismissed.

G. F. L. B.

Solicitor for Appellant—*Leo Doherty,* Manchester.

(*a*) In 1912 and later: Roscoe's *Criminal Evidence* (1921), p. 51.

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When consent is the defence to a charge of rape, the jury must be warned of the absence of corroboration of the female's story.

Consent, if there is none, at any stage, if not fraudulently obtained, is a defence.

Appellant was convicted on February 23rd, at the Derbyshire Assizes, of rape, and sentenced by Mr. Commissioner Finlay to twenty-one months' imprisonment with hard labour.

The defence was consent. The jury, after retiring, asked: "When does 'the rape' commence? We think that the girl did resist at first from the bruises." The learned Commissioner explained the law with regard to penetration.

Maurice Healy for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. I desire to take three points: (1) that there was no corroboration of the girl's story; (2) that the learned Commissioner failed to give any direction on the question of corroboration; (3) that he misdirected the jury on the question of consent.

(1) Although corroboration is not, strictly speaking, necessary in such a case, it is in practice almost invariably required; and in its absence there should always be a careful direction upon the point. Corroboration must be directed to that portion of the prosecutrix's story which the prisoner challenges. In this case it must be directed to the issue of consent. The only conceivable evidence which might be alleged to be corroborative is to be found in (a) the bruises, (b) the condition of the private parts, (c) the torn garment, (d) the girl's condition when she arrived home. None of these items is necessarily inconsistent with the prisoner's story, which is itself far more strongly corroborated by the girl's conduct in making no complaint, in going home with him, and in accepting his presents. The learned Commissioner was wrong in considering the last item a matter of no importance.

(2) That being the state of the evidence, the case was left to the jury as one in which it was for them to say which witness did they believe. This is the exact form of direction which

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was condemned by this Court in *Tate*, 1908, 2 K. B. 680; 77 L. J K. B. 1043; 99 L. T. 620; 72 J. P. 391; 21 Cox, C. C. 693; 52 S. J. 699; 1 Cr. App. R. 39: c. q.

[AVORY J.: That was the case of an accomplice.]

An accomplice is a witness against whom a warning must be given because he is under a temptation to lie. The prosecutrix in a rape case, if a guilty woman, is under exactly the same temptation, and the direction in her regard should be the same.

[He was stopped.]

Caporn for the Crown. In rape corroboration is not necessary: *W. Crocker*, 39 T. L. R. 105; 17 Cr. App. R. 45, 46: 1922; there there was no corroboration, but the jury convicted in spite of a strong warning by the judge, but this Court declined to interfere. An important circumstance is that the jury saw and heard the prosecutrix: *Baskerville*, 1916, 2 K. B. 658: 12 Cr. App. R. 81, &c. Here the jury were distinctly told that they must consider their verdict in "the light of subsequent events."

[AVORY J.: Where was the warning here?]

There was none, in so many words.

[AVORY J.: Is there any independent evidence here inconsistent with consent?]

No one matter: the bruises are the strongest point. It is submitted that there is some evidence more consistent with non-consent than consent, though it is true there is some *vice versâ*. Therefore the true inference must depend on an estimate of the witness's character, and that is for the jury.

[AVORY J.: Practically you rely on the girl's story?]

Yes.

The LORD CHIEF JUSTICE: There was only one issue in this case: consent or no consent. Other than that of the prosecutrix,

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there was no evidence which was inconsistent with consent upon her part. There was, therefore, no evidence to corroborate the testimony of the girl in a material particular, and this fact was not pointed out to the jury in the direction which they received. It is said for the prosecution that warning was unnecessary, and reference was made to *Crocker* (above). On looking at the report of that case I find that, at the beginning, at the end, and at other stages of the summing-up, the judge pointed out to the jury in clear and emphatic language that the evidence of the girl was not corroborated in any way. Therein lies the distinction between that case and this.

Here I might stop: but attention has been drawn to the direction given upon the question of consent. It may well be that a woman in the earlier stages will resist a man's attempts to have connection with her; but if she changes her mind and subsequently permits that which she had hitherto resisted, the consent so given being a real consent, the prisoner is not then to be convicted of rape. For these reasons this appeal must be allowed and the conviction quashed.

Conviction quashed.

H. C.

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JOSEPH SCHWELLER.

To receive goods knowing that the vendor obtained them on credit under false pretences or by means of fraud other than false pretences is not an offence known to the law.

Appellant was convicted, after a three days' trial, on March 1st, 1924, at the Manchester Assizes of obtaining goods, &c. by false pretences, and was sentenced by Greer J. to six months' imprisonment in the second division. He appealed against conviction on certificate.

Eastham, K.C. (with him *J. C. Jackson*), for the appellant, who was present.

Merriman, K.C., and *H. L. Beazley*, for the Crown.

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Only one point in the judgment delivered by the Lord Chief Justice calls for mention. Counts 36—41 of the indictment were all in the following form:—

Statement of Offence.

J. S. receiving goods obtained under circumstances amounting to a misdemeanour contrary to s. 33 (1) (b) of the Larceny Act, 1916.

Particulars of Offence.

J. S. on 8th September, 1922, in the City of Manchester, in the County of Lancaster, did receive from H. V. S. 78 pieces of plains knowing the same to have been obtained by the said H. V. S. on credit under false pretences, or by means of fraud other than false pretences.

In the opinion of the Court there was no allegation of an offence known to the law, and the conviction on these counts, though they are immaterial, is quashed. Sentence to run from the date of conviction, as there was evidence on which other counts could be supported.

Appeal dismissed, except on counts on which conviction quashed.

Solicitors for the Appellant—*Wood and Lord*, Manchester.

HERBERT SYDNEY BUXTON AND TERENCE SCOTT.

Sentences increased.

Appeals against sentence.

Appellants were convicted at the Central Criminal Court on February 11th, 1924, of "blackmailing" (threatening to accuse

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of crime with intent to extort money), and were sentenced by the Recorder of London on various counts concurrently, the former to seven and four years' penal servitude, and eighteen months' imprisonment with hard labour, and the latter to terms of five and three years, and fifteen months.

Appellants in person.

The Court added a year to the term of penal servitude in each case.

Sentences increased.

HARRY LEACH.

Severity of sentence after meritorious military service.

Applicant was convicted on March 6th, 1924, at the Birmingham City Sessions of inflicting grievous bodily harm, and was sentenced by the Recorder to six months' imprisonment with hard labour.

He asked leave to appeal against conviction and sentence. He had been fined twenty shillings for assault in 1923.

Bertram Long for applicant, who was not present.

In view of the circumstances and of applicant's "distinguished and useful career" in the army, where he had gained the Distinguished Conduct Medal, the Court took "the exceptional course" of reducing sentence to the second division.

Sentence reduced.

Solicitor for Applicant—*Percy Harper*, Birmingham.

JOHN WILLIAM WATLING.

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Sentence reduced in view of age and previous character.

Appellant, in person, appealed against a sentence of eighteen months' imprisonment in the second division passed by the Chairman at the Middlesex Sessions on March 8th, 1924, for obtaining money by false pretences. He was seventy-five years old.

The Court, in view of his age and his previous good character, reduced the term to six months.

Sentence reduced.

H. C.

M. ROSS, R. FRIEND, J. BEATTIE, A. LLEWELLYN, H. YOUNG. 14 *April.*

Observations by the Court on the "special" treatment of appellants and applicants under s. 14 (1) *of the Criminal Appeal Act*, 1907.

Reference by the Home Secretary.

Morris Ross was convicted at the Central Criminal Court on October 24th, 1923, of accounting as a bankrupt by fictitious losses, and sentenced by the learned Commissioner to six months' imprisonment in the second division, and recommended for deportation. He applied for leave to appeal against his sentence. *Maurice Friend* was convicted at the County of London Sessions on January 9th, 1923, and bound over and brought up for sentence on March 4th, 1924, of obtaining by false pretences, and at the Central Criminal Court on February 7th, 1924, of fraudulent conversion, and was sentenced by the Chairman and the Common Serjeant respectively to concurrent sentences of twelve and nine months' imprisonment with hard labour. He applied for leave to appeal against his conviction and sentence. *James Beattie* was convicted at the Central Criminal Court on February 7th, 1924, of obtaining by false pretences, and of being a habitual

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criminal, and was sentenced by the Common Serjeant to three years' penal servitude and seven years' preventive detention. *A. Llewellyn* was convicted at Warwick Assizes on March 11th, 1924, of housebreaking, and of being a habitual criminal, and was sentenced by Shearman J. to three years' penal servitude and seven years' preventive detention. *H. Young* was convicted at the Central Criminal Court on March 5th, 1924, of possessing moulds for coining, and of being a habitual criminal, and was sentenced by the learned Commissioner to three years' penal servitude and five years' preventive detention. Beattie, Llewellyn and Young appealed against their sentences.

All the applications and appeals were heard by the Court on April 7th, when they were all dismissed. Subsequently it appeared that from the date of their giving notice of appeal until April 7th the applicants and appellants had not been treated by the prison authorities as appellants within s. 14 of the Criminal Appeal Act, 1907 (*a*). The Home Secretary accordingly invited the opinion of the Court whether or not that course was correct.

Avory J.: In these appeals, heard before the Court on April 7th, a question of prison administration involving the construction of s. 14 of the Criminal Appeal Act, 1907, has arisen, on which the Home Office has invited the opinion of the Court.

Hitherto the Court has acted on the assumption that all appel-

(*a*) The Criminal Appeal Act, 1907, provides, s. 14, sub-s. 1:—An appellant who is not admitted to bail shall, pending the determination of his appeal, be treated in such manner as may be directed by prison rules within the meaning of the Prison Act, 1898, s. 2.

Sub-s. 3:—The time during which an appellant, pending the determination of his appeal, is admitted to bail, and subject to any directions which the Court of Criminal Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment or penal servitude under his sentence, and, in the case of an appeal under this Act, any imprisonment or penal servitude under the sentence of the appellant, whether it is the sentence passed by the Court of trial or the sentence passed by the Court of Criminal Appeal, shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

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lants, including persons applying for leave to appeal, have been treated as such under s. 14, sub-s. 1 of the Act, and that the provisions of sub-s. 3 of the same section have been applied to all appellants, viz., that the sentence is deemed to be resumed or to begin to run, as the case requires, as from the day on which the appeal is determined, subject to any directions which the Court may give to the contrary on the appeal. But it appears from communications received from the Home Office that prison rules have been made called Convict Prison Standing Order No. 34, and Local Prison Standing Order No. 70, which are as follows:—When a convict (or prisoner) undergoing two or more concurrent sentences appeals against one of them, he will not be treated under the rules for appellants if and so long as he is serving a concurrent sentence against which he is not appealing. Though not specially treated as an appellant, such convict (or prisoner) will be allowed reasonable facilities for preparing his appeal, and that the expression in these rules "concurrent sentences" has been interpreted to apply to the following cases:—

1. A convict under sentence of penal servitude and preventive detention who appeals only against the sentence of preventive detention;

2. A prisoner under sentence of imprisonment and flogging who appeals only against the flogging;

3. A prisoner under sentence of imprisonment and a recommendation for deportation who appeals only against deportation;

and that in these and the following cases:—

4. A prisoner under concurrent sentences of imprisonment and penal servitude who appeals only against the penal servitude;

5. A prisoner under one sentence who appeals against a sentence consecutive thereupon;

the appellants are not treated specially as appellants, with the result that that part of the sentence which is not specifically the subject of appeal continues to run, notwithstanding the express provisions of sub-s. 3 of the statute.

In the opinion of the Court the above cases Nos. 1, 2 and 3 are not "concurrent sentences," but one sentence in each case, and therefore are not within the Prison Standing Orders which have been quoted, and the Court is further of opinion that in all the

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above cases, Nos. 1, 2, 3, 4 and 5, the person appealing is an appellant within the meaning of s. 14 of the Criminal Appeal Act, 1907, and should be treated as such pending the determination of his appeal, and that his sentence or sentences, as the case may be, should, in accordance with sub-s. 3, be deemed to be resumed or to begin to run as from the day on which the appeal is determined, subject to any directions which the Court in the exercise of its discretion may give to the contrary on the appeal. This provision is the only check on the number of frivolous appeals with which the Court is burdened, and of which frequent complaint has to be made.

As an illustration of the difficulty of allowing one part of the sentence to run when the appellant is appealing only against another part of the same sentence, it may be pointed out that if a prisoner is sentenced to penal servitude and a flogging, and appeals only against the penal servitude, he would presumably be flogged pending the appeal, and the Court, on the hearing of the appeal, might come to the conclusion that the offence which had been committed was not one for which the punishment of flogging could legally be inflicted.

G. F. L. B.

The Court (the Lord Chief Justice, Sankey and Swift JJ.) also sat on April 16th.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE ROCHE.

WILLIAM STACEY LYLE.

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5 *May.*

A fraudulent conversion begun abroad (even though triable there), but completed by receipt of the proceeds in this country, is justiciable in this country.

Appellant was convicted on April 3rd, 1924, at the Central Criminal Court on an indictment containing thirteen counts relating to offences against the Larceny Act, 1916, 6 & 7 Geo. 5, s. 20 (1) (iv) (b),* and was sentenced by the Common Serjeant to nine months' imprisonment in the second division. The Common Serjeant granted a certificate for an appeal upon two grounds, which were argued at the trial. These were (1) that there was no evidence that appellant had received the property in question "for or on account of any other person," and (2) that the Central Criminal Court had no jurisdiction to try the case.

Appellant did not give evidence at the trial, but the facts, which were not disputed, were as follows:—Appellant was provincial agent for a company known as the African and Eastern Trade Corporation, at Accra, on the Gold Coast, West Africa. This corporation controlled eight other companies also engaged in business there, one of which was F. & A. Swanzy, Ltd., by which company appellant was formerly employed, and through which his salary was paid and his accounts with the Trade Corporation kept. Appellant had a power of attorney enabling him to draw cheques on the bank in respect of all eight subsidiary companies.

In 1922 appellant was in financial difficulties, and made

* "Every person who . . . . having either solely or jointly with any other person received any property for or on account of any other person fraudulently converts to his own use or benefit . . . . the property or any part thereof or any proceeds thereof shall be guilty of a misdemeanour . . ."

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arrangements with the directors of the African and Eastern Trade Corporation by which the said company lent him £800 to pay his debts. In March, 1923, appellant instructed the agent for F. & A. Swanzy, Ltd., to draw a cheque upon its account with the Bank of British West Africa at Accra, payable to that bank. Appellant also signed a cable transfer form directing the bankers to transfer part of the amount of the cheque in question to certain named private creditors in England, and the balance to his personal account with his bankers in London, and the bank in Africa cabled these instructions to the London office, and the amounts were transferred accordingly.

These were the facts in respect of eight cheques which formed the subject of the indictment. In five other cases the cheques were drawn at appellant's request on account of the African and Eastern Trade Corporation upon the Colonial Bank at Accra, and payable to that bank. Appellant then followed the same procedure as in the first class of cases, the money being eventually paid by the Colonial Bank in London to appellant's private account there. All the thirteen cheques were on the appellant's instructions debited to his personal account in the books of F. & A. Swanzy, Ltd., at Accra.

Roland Oliver (with him *G. B. McClure*) for the appellant, who was present. Upon the first ground of appeal the cheques were received by appellant "for and on account of himself," and not "for and on account of others," as described by the Larceny Act, 1916, s. 20, sub-s. 1 (iv) (b). They were appellant's cheques throughout, although drawn in favour of the Bank of West Africa; for the amount in the body of the cheques was debited to appellant's personal account with Swanzy & Co. He was never a trustee for the cheques.

On the ground of jurisdiction, conversion is a single act, and that act, if committed at all, was committed by appellant in West Africa, and not here. The bank in London knew nothing of the origin of the cheques, and acted solely on their instructions from their West African branches. If cheques have once been converted to a man's own use, he cannot afterwards be guilty of converting the proceeds.

Sir H. Curtis Bennett, K.C. (with him *St. John Hutchinson* and *H. Shanly*), for the Crown was not called upon.

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The LORD CHIEF JUSTICE (after stating the above facts): There are here two classes of cases. In the first class the money is said to have been received "for and on account of" F. & A. Swanzy, Ltd., from the Bank of British West Africa, its bankers; in the second class, "for and on account of" that and other subsidiary companies from the Colonial Bank. In the first class appellant instructed the agent for Swanzy & Co. to draw cheques payable to the company's agents. He then gave instructions that the proceeds of the cheque in London should go to certain purposes. Until the cheque left the bank it was held by the bankers on behalf of their customers, that is to say, Swanzy, Ltd. The offence committed by appellant was that he caused the proceeds of this cheque to be converted to his own use. That offence was not completed until the proceeds were paid over to him in London, although it began at Accra, on the Gold Coast. In the second class of cases it is true that appellant might be charged in West Africa, but upon the facts here he might equally be charged with the commission of the offence in London. For although the matter began in West Africa, the effective conversion took place here.

Appeal dismissed.

Solicitor for Appellant—*Freke Palmer.*

Solicitors for Respondents—*Last, Riches and Fitton.*

F. P. F.

E. J. DELCANHO, S. SHEFFIELD, G. WHITESIDE.

The Court will rectify a technical error in a verdict without necessarily reducing sentence.

Observations on consecutive sentences exceeding in term sentence for a single offence.

Delcanho and Sheffield were convicted at the Central Criminal Court on March 28th, 1924, of demanding money with menaces, and were each sentenced by McCardie J. on April 1st to four years' penal servitude. Whiteside was convicted there of the

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same offence on April 1st, and sentenced by McCardie J. to four years' and three years' penal servitude.

Delcanho applied for leave with regard to conviction only; the others with regard to sentence also.

Hockman for Delcanho, who was not present. There were three counts, viz., for demanding money with menaces, stealing, and knowingly receiving. The third count—receiving—was not left to the jury, and no direction was given to them on that count against assuming joint possession by both prisoners, or knowledge by Delcanho, or against conviction merely on the ground that a wallet (from which notes had been abstracted) was found on premises occupied jointly by both prisoners.

The jury was entitled to direction on both matters of fact and questions of law.

The conviction on a charge which was not left to the jury is equivalent to conviction on a charge which was withdrawn, or to conviction on extraneous subject-matter, and should be quashed.

The jury returned a verdict of not guilty on the second count—stealing—and guilty on the first and third counts (*a*). The verdict of not guilty on the second count was a general verdict, and was in itself unambiguous. When in a case of felony a jury

(*a*) According to the shorthand note—"McCardie J.: I did not really leave the third count for receiving, but I see what you mean: you know all the points about it. You are satisfied that knowing that this property had been stolen, the money and the wallet, by the other men [not in custody], they received that money and the wallet into their possession knowing it had been stolen? The Foreman: Yes. McCardie J.: Very well, I quite understand that. On the second count—I do not know if you have fully considered that, because if you think, you know, that these two men were there taking part in the demanding money and goods with menaces, if you think that, you may well think, too, that they were parties to the stealing. I do not quite follow how you can acquit them of the second charge if you find them guilty of the first. I suppose what you mean is that they did not actually put their hands on the man. The Foreman: That is so. McCardie J.: That is what you mean, is it? The Foreman: Yes. McCardie J.: But are you satisfied that they were actually approving and assenting to what the other men were doing? The Foremen: Yes. McCardie J.: You are—very well, then, subject to anything counsel may say, I think you ought to find them guilty on the second count if I understand now what you mean. . . . . The Clerk of the Court: You find them both guilty on the whole indictment, and that is the verdict of you all? The Foreman: Yes."

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returns a general verdict, the judge has no right to ask them to find special facts. *Allday*, 8 C. & P. at p. 140: 1837; *per* Lord Abinger.

The judge did ask the jury to find special facts after they returned their verdict of not guilty on the second count.

When a jury has given a general verdict on a count the judge should not give them further directions on that count, and ask for a second verdict after such further directions. Such second verdict should be quashed. *Raines*, 69 L. J. Q. B. 681; 82 L. T. 724; 64 J. P. 408; 19 Cox C. C. 524; C. C. R.: 1900. Such further direction is a dangerous invasion of the right to trial by jury. There was no separate deliberation by the jury on their second verdict.

The judge misdirected the jury on the first count by directing them to consider whether there was a conspiracy between Delcanho and the others to steal from the prosecutor, and if so, to weigh the evidence in the light of such conspiracy. And in directing them that the others concerned in the offence were in Petersham Mews—the joint room of the two defendants—while Delcanho was detaining the prosecutor there, when there was no evidence of such fact.

Where there has been a misdirection the Court will quash the verdict, unless the facts are consistent only with the guilt of the prisoner. The Court will not usurp the functions of the jury. *Dyson*, 1908, 2 K. B. 454; 77 L. J. K. B. 813; 99 L. T. 201; 72 J. P. 303; 24 T. L. R. 653; 7 Cr. App. R. 13: c. q.

The application in respect of sentence is withdrawn.

Beaufoi Moore for Whiteside.

1. The learned judge misdirected the jury in that he omitted in his summing-up to warn them that the evidence given by the man Robson, who pleaded guilty, and that of Doyle, a self-confessed blackmailer, both of whom were either confederates or accomplices, should not be accepted by the jury without corroboration. *Tate*, 1908, 2 K. B. 680; 1 Cr. App. R. 39: c. q.; *Baskerville*, 1916, 2 K. B. 258; 12 Cr. App. R. 81; *Everest*, 73 J. P. 209; 2 Cr. App. R. 130: 1909; *Nookes*, 5 C. & P. 326: 1832.

2. That the learned judge in summing-up devoted himself almost entirely to the evidence given by the prosecution, and

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never adequately placed before the jury the evidence given by and on appellant's behalf.

3. That there was no evidence of appellant using any threats or demanding any money with menaces, on the contrary, the evidence for the prosecution was entirely to the contrary.

4. That the learned judge had no power under the statute 24 & 25 Vict. c. 96, s. 45, to inflict a sentence of more than five years.

The LORD CHIEF JUSTICE: The verdict on the third count must be quashed. The jury intended to substitute the verdict of guilty on the second count for their verdict of guilty on the third count.

Although the word conspiracy was used in the summing-up no harm was done.

The verdicts on the first and second counts stand.

The application in respect of sentence had been withdrawn—a mere coincidence, perhaps, in view of the course the Court had taken in a similar case on April 7th last.

In Whiteside's case, although it was not usual to pass consecutive sentences making the total term greater than the statutory term for the single offence, yet the Court thinks that this is a proper case for such a sentence; the terms were in respect of different offences, against different persons, on different days.

Applications refused.

Solicitor for Applicant Delcanho—*Nabarro.*

Solicitor for Applicant Whiteside—*Ross Dagg.*

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In charges of sexual offences corroboration of the testimony of the prosecutrix is not in law essential, but is in practice required.

If, on the trial of such a charge, there is corroboration on one count referring to one date, but there is none on another about another date, and the Court rejects the corroboration on the former (it being possible that the jury gave credit to it on both counts) it may quash a conviction on both.

Appeal against conviction and sentence.

Appellant was convicted at Ipswich Assizes on January 22nd, 1924, of having carnal knowledge of a girl under sixteen years of age, and was sentenced by Horridge J. to twenty-one months' imprisonment with hard labour.

On March 17th, when leave to appeal was given, the Court granted appellant bail on his own recognisance in a sum of £50, and the recognisances of two sureties in the sum of £25 each.

C. E. Jones for the appellant. An order had been made by the Court that *R. Frost*, a constable, a witness for the defence who had been unable to attend the trial owing to illness, should be examined on commission (*a*).

[The LORD CHIEF JUSTICE: The witness's evidence is before the Court and has been read.]

That was not the only evidence he desired to call. He applied that he might further cross-examine *Ivy Barker*, one of the witnesses for the prosecution, having regard to other facts which had come to light.

(*a*) This was the first order of the kind made by the Court under s. 9 (b) of the Criminal Appeal Act, 1907. It ran: In the Court of Criminal Appeal, Criminal Appeal Act, 1907, *Rex* v. *William George Berry* (Appellant). Upon consideration being this day had by the Court of Criminal Appeal, as duly constituted for the hearing of appeals under the Act, of the application of the above-named appellant for:— . . . .

(f) Leave to examine a witness.

The Court doth determine the same, and doth order that Richard Frost be examined before Thomas Dalton Lawrance, Esq. [an officer of the Court], at Easton Wickham Market, Suffolk.

Dated this 30th day of April, A.D. 1924.

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[The LORD CHIEF JUSTICE: On what ground do you say the conviction should be quashed?]

The evidence, even as it was before the Court, was such that a verdict of guilty was an unreasonable verdict, and one that could not have been found after careful consideration of the facts. There were matters which the learned judge had not put before the jury.

[SHEARMAN J.: There have been subsequent proceedings for bastardy by the prosecutrix, and there has been a difference of opinion among the magistrates; they felt doubt about it.]

I have a copy of the justices' notes.

[SHEARMAN J.: Would not the matter be better tried before the Home Office than before three judges in Court? Were there not important contradictions?]

Yes; important contradictions.

[SHEARMAN J.: By Ivy Barker?]

Yes; she said that she was at home on December 19th, 1922, suffering from scarlet fever, and that feeling hot between 5.15 and 5.30 p.m., she went to the open window and saw Rose Goodwin and appellant lying down at a distance of 115 or 120 yards from the house. She also said they came quite close to the house. It has now been ascertained that Ivy was not suffering from scarlet fever that year, but the year before, and that she was attending school the whole of the month of December, 1922.

[The LORD CHIEF JUSTICE: The school attendance officer is here, is he not?]

I have a copy of the register.

[The LORD CHIEF JUSTICE: I am told that the original register is here. In fact we have copies of it, and it shows in fact that the girl was at school on that 19th of December, 1922. Does counsel for the Crown say that the conviction can be supported?]

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Gerald Dodson for the Crown. I am entirely in your Lordships' hands. If the charge which was made of the offence of 19th December, 1922, were the only one, probably the Court would say that, having regard to the fresh evidence available, which was not before the Court below, and having regard to the fact that it was quite obvious that Ivy Barker had at least made a mistake in a particular which might have been material in the minds of the jury, and was not discovered in the Court below, it would be difficult to say that the jury would have come to the conclusion at which they did arrive, and it would be difficult to support the conviction. The fresh discoveries, so far as they related to the 19th of December, materially affected this case, and showed a great distinction between the evidence now and that when it was tried. But he would point out that appellant was tried for two offences of having carnal knowledge of this girl—on December 19th, and with another offence in December on a date unknown. The two offences were specifically left to the jury by the learned judge. The main controversy raged around December 19th, which was the more important date, but there was also the charge against appellant of the offence on the date unknown. The girl was thirteen years and ten months old. Both cases went to the jury, and while there was no corroboration of the offence on the date unknown, the jury were cautioned on that point.

[SHEARMAN J.: If this conviction is set aside it does not mean that the witnesses for the prosecution have committed perjury, but that the Court is not satisfied.

The LORD CHIEF JUSTICE: The effect of what has appeared later is to get rid of the corroboration of the alleged offence on December 19th. In regard to the other alleged offence there was no corroboration?]

C. E. Jones: No; and he denied it.

The LORD CHIEF JUSTICE: There were two counts in the indictment, one alleging an offence on December 19th, 1922, and the other a similar offence upon a date unknown in the same month. Leave was given by this Court to appeal because certain matters which did not appear at the trial were brought to the notice of

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this Court. It seemed right that these matters should be further explored. They had been further explored, and the result had been to show that in certain particulars the corroborative testimony, so far as there was corroborative testimony, of the story of the prosecutrix, was, to say the least, in certain respects inaccurate and doubtful. He purposely abstained from making any further criticism upon it. The law was, of course, that in cases of this kind corroboration of the testimony of the person who suffered the outrage was not essential, but in practice it was required. With regard to one of these two dates, as counsel for the Crown frankly admitted, there was no suggestion of corroboration, but in regard to the other date there was corroboration of the kind which had been the subject of further investigation. The result of that investigation was to show that the corroboration could not be accepted if all the facts were known. It was very difficult to speculate, and perhaps impossible to speculate, upon the effect which might have been produced upon the jury's minds, first, of the coupling of these two charges together, and secondly, upon the discovery, if the jury had discovered, that the only corroborative testimony was testimony which could not be accepted. As the matter stood it might be that the one charge reinforced the other. As it developed it might be that the failure of corroboration would, if it had been known to the jury, have prevented them from returning the verdict they did. It is impossible for the Court to say that if the materials had been before the jury which were now before the Court they would inevitably or certainly have come to the same conclusion. In the opinion of the Court, in view of what had been ascertained subsequently, including as it did the testimony of a witness whom the appellant desired to call, but who was prevented by illness from being called, the conviction was one which ought not to stand. In those circumstances, and without making any observations either upon the course of the trial or the conduct of the witnesses at the trial, in the opinion of the Court the conviction ought to be set aside and the appeal allowed.

Conviction quashed.

Solicitors for the Appellant—*Messrs. Yorke and Argent,* Saxmundham.

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The law and the practice in respect of founding counts on facts disclosed on the depositions are as stated in Clarke and Lyons, 59 *J. P.* 247 : 1895.

" The opinion of the Court" within s. 1 *of* 30 & 31 *Vict. c.* 35, *the Criminal Law Amendment Act*, 1867, *need not be taken before a Bill is presented to the grand jury : it is sufficient if such opinion appear from the course of the trial.*

Appellant was convicted at the Leeds Assizes on April 3rd, 1924, of obtaining goods by false pretences, and sentenced by Commissioner Judge Radcliffe, K.C., to five years' penal servitude. He appealed against conviction and sentence.

R. F. Burnand for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The ground of appeal was that there had been irregularities in the trial against the provisions of the Vexatious Indictments Act and the Criminal Law Amendment Act, 1867. Appellant was committed for trial in respect of offences under the Debtors and Bankruptcy Acts, but not on the charges of obtaining goods by false pretences on which he was convicted.

[The Lord Chief Justice: Did the magistrate refuse to commit on any charge of obtaining by false pretences?]

My information is that he did not commit on that charge, and the prosecutor was not bound over to prosecute on that charge. S. 1 of the Vexatious Indictments Act, 1859, 22 & 23 Vict. c. 17, provides that: "No bill of indictment for any of the offences following . . . shall be presented to or found by any grand jury unless the prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer to any indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the superior Courts of law." The Act made

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it necessary for the leave of the judge to be obtained in writing before a bill could be presented on a charge on which the accused had not been committed, but in this case there was nothing to show that such leave had been given. The section to which he had referred had been modified by the Criminal Law Amendment Act, 1867, 30 & 31 Vict. c. 35, s. 1. If the facts appeared in the depositions it appeared that no leave was necessary. In the present case, on the morning of the first business day of the Leeds Assizes, there was one indictment against appellant containing charges under the Debtors and Bankruptcy Acts on which the justices had committed him; secondly, charges founded entirely on new matter on which additional evidence was to be called; and thirdly, charges of obtaining goods by false pretences which had been before the magistrate, and on which he had refused to commit. The junior counsel for the prosecution asked leave of the learned Commissioner to add certain charges founded on additional evidence, but did not refer to any false pretence charge which had been before the magistrate, and on which he had not committed. I contended that as these charges of false pretences on which the magistrate had refused to commit appeared in the same indictment, therefore the indictment was bad.

[The LORD CHIEF JUSTICE: If a separate bill had been presented it would have been in order?]

Yes, if leave had been given. *Brædlaugh*, 15 Cox, C. C. 156; 47 J. P. 71; 31 W. R. 229; 47 L. T. 477: 1882: Q. B. D.

G. F. Mortimer, K.C. (with him *Paley Scott*), for the Crown. It was unknown to his junior what were the exact charges on which the accused had been committed. He had no knowledge of any refusal to commit; what the stipendiary magistrate said was that it would be sufficient to commit on the charges under the Debtors and Bankruptcy Acts. With regard to the additional counts under the Debtors Act not founded on evidence in the depositions, his junior made his application before the bill went to the grand jury, and the learned Commissioner gave him leave. These were counts the evidence as to which was not disclosed upon the depositions. There were also certain counts which his junior had inserted in the indictment relating to obtaining goods by false

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pretences. They were all framed on evidence which appeared in the depositions, and he did not think it necessary to ask for leave to add them. The evil which the Vexatious Indictments Act aimed at was to prevent charges being made of which the accused had no notice. Here the charges were all based on evidence on the depositions. After the facts were disclosed on the depositions there was no reason whatever to apply to the judge to allow the counts to go before the grand jury. The judge had the depositions, and tacitly gave his consent, if no objection, as here, was taken at the trial by the defending counsel.

He referred to *Crabbe*, 59 J. P. 247: 1895, where the application for leave was refused. He also referred to *Clarke and Lyons*, 59 J. P. 248: 1895, where it was held that it was not necessary to obtain the consent of the Court to the addition of counts for offences within the Vexatious Indictments Act before the bill was presented to the grand jury if the facts on which the counts were founded appeared upon the depositions.

The LORD CHIEF JUSTICE (*a*): This appellant was convicted upon an indictment which charged him in six counts, numbered 1, 4, 7, 16, 19 and 22, with obtaining goods by false pretences with intent to defraud, in certain other counts with offences under the Debtors Act, 1869, and in one count with an offence under the Bankruptcy Act. In the result he was sentenced to five years' penal servitude upon the counts for false pretences, and no sentence at all was passed in respect of the other counts. The appellant now appeals against conviction and sentence. The facts proved against him were that he took a lock-up shop in Newcastle, and then by representing by the heading of his note paper that he was carrying on a genuine business as a saddler, boot-dealer, and dealer in hosiery and drapery stores, obtained large quantities of goods. There was evidence that the shop was often closed during ordinary business hours, and that finally, when the appellant was arrested, the shop contained no goods at all. There was a great deal of evidence showing that goods had been supplied which were not paid for, and the appellant did not go into the witness box.

On the merits of the case there is nothing to be said, but it is

(*a*) This judgment is printed from the transcript of a shorthand report supplied by the courtesy of the Director of Public Prosecutions.

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said, or suggested, that a difficulty arises with regard to the indictment, inasmuch as although the learned magistrate had committed upon the charges under the Debtors Act of 1869, and the Bankruptcy Act, he had omitted, if not refused, to commit upon the charges of false pretences. It is said that an application was made to add charges not of false pretences, but under the Debtors Act, arising upon new materials; about that no observations are needed, but it is said that the indictment, when it came to be framed and presented to the grand jury, contained those six counts which I have mentioned for false pretences based indeed upon facts and evidence contained in the depositions and examination before the justice, but charges upon which there had been at any rate an omission if not a refusal to commit, and it is said that in consequence of the provisions of the Vexatious Indictments Act it was not possible to add those counts in the indictment, and that if it was desired to proceed upon them there should have been a specific application to the judge, and that they should have been made the subject of a separate indictment.

In the opinion of the Court that submission is one that cannot be supported; it depends upon a misconstruction of the first section of the Criminal Law Amendment Act of 1867. Under the Vexatious Indictments Act of 1859, it had indeed been provided that no bill of indictment for certain offences named, of which obtaining goods by false pretences was one, might be presented to or found by any grand jury unless certain conditions were fulfilled. Then came the Act of 1867, which in order to remove the inconvenience caused by the earlier Act enacted: "That the said provisions of the said first section of the said Act shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the Court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such Court in due course of law." In other words, the later Act is based upon the view that when

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the conditions expressed are fulfilled, the accused person is not taken by surprise.

It was said, nevertheless, notwithstanding the provisions of the Act of 1867, that what was done here was contrary to the law, but that argument also appears to be unsustainable. The matter is made plain by the case of *The King* v. *Clarke* in 59 Justice of the Peace, at page 248. The practice of the Court was then explained by Mr. Avory, as he then was, appearing with Mr. C. W. Mathews, as he then was, in these terms: "The practice of this Court (*b*) has been established for years that where the added counts are alleged to be founded on facts disclosed on the depositions, they may be added without the opinion of the Court being taken before presenting the bill to the grand jury," and that practice was supported by the judgment of Mr. Justice Henn Collins, as he then was, who said, among other things: "I think that the obvious convenience is in favour of the view taken by the prosecution, and the words of the Act do not compel me to take any other view. The amending Act says that provided the subject-matter of the new count may be lawfully joined with the rest of the indictment, and that the facts on which such count is founded (in the opinion of the Court in or before which the same bill of indictment be preferred) are disclosed on the depositions, the indictment can go before the grand jury properly. Whether the count is lawfully joined or not must be for the judge when it comes before him." When these counts did come before the judge, the indictment having gone before the grand jury in that way, no objection was taken, nor did any objection appear to the mind of the learned judge.

In those circumstances, in the opinion of this Court, this appeal against conviction fails.

With regard to the sentence, it is to be observed that the appellant has a bad record; not only was he sentenced to penal servitude in 1911, 1915 and 1917, but it is clear that he had only just been released from a sentence of twelve months' imprisonment with hard labour upon a conviction of false pretences when he began again to obtain goods without paying for them in the way disclosed by this case. So far, therefore, as sentence also is concerned, this appeal fails and is dismissed. Leave was given, and

(*b*) The Central Criminal Court.

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therefore the normal consequence follows, and the time will run from conviction.

Appeal dismissed.

W. E. H.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ROCHE AND MR. JUSTICE BRANSON.

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A judge in summing up is bound to put defendant's case to the jury. A mere expression of the view of the judge is not sufficient to dispense with the duty of putting the case for the defence to the jury.

Appellant was convicted at the Derbyshire Sessions, on April 9th, 1924, of larceny, and was sentenced to eighteen months' imprisonment with hard labour. He appealed against conviction and sentence.

Christmas Humphreys for the appellant (under s. 6 of the Criminal Appeal Act, 1907), who was present. On the occasion of the trial the Chairman of the Sessions was absent, his place being taken by the Deputy Chairman, with the result that the second Court, in which appellant was tried, was presided over by the Deputy Vice-Chairman. Appellant's ground of appeal was that he had a perfectly good defence in law which was not put to the jury by the judge, who, in a very short summing-up, directed them that the accused was guilty. The case for the prosecution was that the appellant's landlady lent him an overcoat belonging to her husband, and that, having obtained it, appellant went away and did not return. The defence was that appellant went with his landlady to the shop where the coat was sold on November 23rd, a week before the alleged theft, in order

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to purchase the overcoat, and that he tried it on; that he thought it was being bought for him, and that he was to pay for it by weekly instalments. This defence was not put to the jury.

[The LORD CHIEF JUSTICE: The summing-up was certainly a model of brevity, but it had the defect that it did not put the case for the defence.]

H. T. Wright for the Crown. The judge strongly expressed his own opinion when he summed up.

[ROCHE J.: He was entitled to do that, but it seems that there was no investigation of the matter of the coat.]

The LORD CHIEF JUSTICE: The evidence showed that the appellant lodged with a man and his wife, and on November 30th he asked the wife to lend him an overcoat. It was said that she lent him one for which her husband was paying by instalments, and that the accused then disappeared. The appellant did not deny that he went off with the overcoat, but he said that the woman went with him to Mansfield to buy the coat, and that he tried it on in the shop. There were some discrepancies in the accused's stories, one of which was that the coat was presented to him. He always said, however, that the coat was not stolen, but was intended for him. His counsel said that the case for the defence was never so much as put at Sessions. The summing-up had been read, and it was only necessary to observe that it was clear, as counsel had contended, that the case for the accused was not put to the jury. On the contrary, the Deputy Vice-Chairman had said that, although it was for the jury to say whether the man was guilty or not, there could be no doubt that he was guilty. In the opinion of the Court the conviction could not be supported. The appeal would be allowed and the conviction quashed.

Conviction quashed.

W. E. H.

DONALD SMITH.

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To convert money paid by way of deposit as security for the honesty of a person entering employment may be fraudulent within s. 20 (*iv*) (*a*) *of* 6 *&* 7 *Geo.* 5, *c.* 58, *the Larceny Act*, 1916.

Hotine, 68 *J. P.* 143: 1904, *is not to be extended beyond the case where money is received as a loan.*

Appeal against conviction, on certificate.

Appellant, who was not in custody, was convicted on April 7th, 1924, before the Recorder at the Central Criminal Court, of fraudulent conversion. Judgment was respited.

Oddy for the appellant. The *Attorney-General* (with him *Giveen* and *G. D. Roberts*) for the Crown.

Oddy: The facts sufficiently appear from the judgment. The conviction was under s. 20, sub-s. 1 (4) (a), of the Larceny Act, 1916. At the close of the evidence for the prosecution I made a submission to the Recorder that, on the facts deposed to, the accused had not brought himself within the terms of the section. I relied on the decision of the late Sir A. Bosanquet, C. Sjt., in *Hotine*, 68 J. P. 143: 1904, where prisoner was charged under the Larceny Act, 1901, s. 1, which was re-enacted in s. 20 of the Larceny Act, 1916. The facts were exactly similar to those in the present case, and the Common Serjeant, after consultation with Phillimore J., came to the conclusion that the money which was the subject of the case was a loan.

[Roche J.: In *Hotine* a promissory note was given.]

The two cases are almost parallel. In *Hotine* the money was to be returned in three months, as in this case, and a receipt was given over a sixpenny receipt stamp, which was an acknowledgment of the debt and of an agreement to repay.

[The Lord Chief Justice: Is it not a question of fact?]

The Recorder decided that it was a question for the jury.

[The LORD CHIEF JUSTICE: Look at the words of the section: "Entrusted with any property in order that he may retain in safe custody." Was there not evidence in the present case that the appellant was to retain the money in safe custody?

ROCHE J.: And that does not give you the right to spend the money.]

To use it.

[ROCHE J.: Or to use it.

The LORD CHIEF JUSTICE: At what moment do you say the property in the money passed?]

It passed when it was handed over. He put it with his own money at the bank. How could it be said that the money still remained the other man's property? I submit that appellant was not a trustee.

[The LORD CHIEF JUSTICE: The proposition for which you are contending is that there were no materials on which the jury could take an adverse view.]

I say that the Recorder should have decided the matter of law. Once the case was put to the jury *in toto* it was open to them to say that he was a trustee and guilty of fraudulent conversion. The question whether appellant brought himself within the section was a matter entirely for the Recorder, who could then have left to the jury the question of fraudulent conversion. *Hotine* was considered in *J. B. Noel*, 1914, 3 K. B. 848; 84 L. J. K. B. 142; 112 L. T. 47; 24 Cox, C. C. 486; 10 Cr. App. R. 255. Counsel also referred to *T. O'Brien*, 75 J. P. 392; 22 Cox, C. C. 374; 104 L. T. 113; 27 T. L. R. 204; 55 S. J. 219; 6 Cr. App. R. 108: 1911.

[The LORD CHIEF JUSTICE: The question in each case is, did it become a loan?]

The accused was entitled to have it decided then and there if,

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on the evidence for the prosecution, there was no case to go to the jury. The money in this case was a deposit for the security of the honesty of a person entering his employment.

The *Attorney-General* was not called upon.

The LORD CHIEF JUSTICE (*a*): This appellant, Donald Smith, was convicted on four counts in an indictment which charged him with fraudulent conversion of property contrary to s. 20 (iv) (a) of the Larceny Act, 1916. Judgment was respited, and the appellant now appeals upon a certificate granted by the learned Recorder for the City of London. The sub-section under which the indictment was laid is as follows: "Every person who . . . being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof . . . shall be guilty of a misdemeanour." Now the facts in the case, so far as it is necessary to recapitulate them, were as follows:—A man named Nolan, to whose case two of the counts in the indictment referred, gave evidence that in November last, when he was unemployed, he saw an advertisement in a newspaper, and in consequence of that called upon the appellant, and the appellant told him that he had recently opened, in Borough High Street, a branch office of what he called his business transfer agency, and that he wanted a manager for that office. The appellant, according to the evidence, told Nolan that he required the sum of £50 security in case he should prove dishonest, and, in reply to an enquiry from Nolan, added that the deposit would be returned at the end of three months, and that he, the appellant, would place it on deposit at Barclay's Bank, and he showed Nolan a cheque book. Nolan agreed to try the employment. Next day he handed over £8; he was to be paid £2 a week and 1 per cent. commission on sales; the appellant undertook to teach Nolan the business, and Nolan went to the office on December 3rd. He handed over the balance of £42 to the appellant, and remained at the office until the 23rd January. There was substantially no business, and he received in wages a sum of £13. On the 23rd January Nolan went to the

(*a*) This judgment is printed from the transcript of a shorthand report supplied by the courtesy of the Director of Public Prosecutions.

appellant's office and found him in the act of removing his furniture. The appellant said he was closing that office, and had lost practically everything. Nolan, very naturally, asked about his £50, and the appellant said that he had lost that sum too in speculation. That was the case of Nolan.

Budden, another person whose case was the subject of two other counts, on the 26th November saw the advertisement, and wrote and went to the appellant. The appellant told him the same story, and said that he would teach Budden all there was to know about the business, which perhaps proved to be true. The appellant said that he required £50 as security for Budden's honesty, because he had already had two other persons in his employ who had run away with some money. He went on to assure Budden that he would hold the money and put it into Barclay's Bank as security for him. A similar fate overtook Budden to that which had overtaken Nolan.

Now at the close of the case for the prosecution it was submitted that upon the authority of *Hotine's* case, in 68 Justice of the Peace, p. 143, there was no case to go to the jury, but that, as a matter of law, the learned Recorder ought to hold that the appellant must be acquitted. It is not necessary to make more than two observations on that case. First of all the facts of the case do not appear to be clearly and fully reported; secondly, if the judgment in that case was intended to be a judgment in general terms that where money is paid by way of deposit as security for honesty by a person entering employment, the person to whom the money is paid is entitled to use it as his own, then in the opinion of this Court the judgment cannot be supported. Reference was made to that judgment in the case of *Noel* in this Court, reported in 10 Criminal Appeal Cases, p. 255, where Mr. Justice Ridley, at p. 260, giving the judgment of the Court, and referring to *Hotine's* case, said this: "That was a case where money was delivered to an employer as a guarantee of the honesty of persons employed by him, and the question was whether the money so entrusted was within the Larceny Act, 1901. According to the view of the Common Serjeant and Mr. Justice Phillimore the money could not be so treated; they regarded it as money which the appellant was entitled to use. If so, it became a loan. *Hotine's* case was treated in this way by Lord Chief Justice Alverstone in *Lord's* case, 69 Justice of the Peace, p. 467: 1905.

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If *Hotine* is to be treated otherwise it cannot be supported." In other words, it may appear upon the facts of a particular case that money which is deposited is money which really, according to the substance of the transaction, is lent, but it is a question of fact upon the evidence in the particular case whether that is or is not the true nature of the transaction. Now the learned Recorder here rightly, in the opinion of this Court, left it to the jury to say upon the evidence what the true nature of this transaction was. The jury came to the conclusion not that the money was lent, but, on the contrary, that it was entrusted to the appellant to be kept for a particular limited purpose, and, upon the happening of certain events, to be handed back to the depositors. The jury came to the conclusion upon the evidence that the money was not lent, but was entrusted, and was fraudulently converted. In the opinion of this Court there was ample evidence to justify the jury in coming to that conclusion, and the learned Recorder quite rightly left it to the jury to say upon the facts of the case what the true nature of the transaction was.

With regard to the judgment in *Hotine's* case its effect is not to be extended. The learned Common Serjeant who delivered that judgment, dealing with the particular facts of that case, was a lawyer of eminence whose opinion expressed and accurately reported on a given state of facts deserves always respectful attention. It is impossible to think that in that case the learned Common Serjeant of that day intended to lay down any such general proposition as that which this Court has been asked to entertain. In these circumstances, in the opinion of this Court, this appeal ought to be dismissed.

Appeal dismissed.

W. E. H.

BEFORE

THE LORD CHIEF JUSTICE, AVORY, HORRIDGE, LUSH, ROWLATT, BAILHACHE, SHEARMAN, SANKEY, McCARDIE, ROCHE, GREER, SWIFT AND BRANSON JJ.

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On a true construction of s. 10, *sub-s.* 2, *of* 8 *Edw.* 7, *c.* 59, *the Prevention of Crime Act*, 1908, *one of the issues to be tried between the Crown and the prisoner is* (Held *by a majority of the Court*) *whether the latter "is leading a persistently dishonest or criminal life" at the relevant time.*

Therefore, where an offender is charged with being a habitual criminal, and does not admit the charge, it is always a question for the jury to determine whether he is a habitual criminal or not. The fact that he has previously been found to be a habitual criminal, and has been sentenced as such, does not conclude the question, nor does it prevent the offender from giving or adducing evidence on his own behalf.

See 17 Cr. App. R. 198 (*a*).

R. Oliver (under s. 10 of the Criminal Appeal Act, 1907) for the appellant, who was present.

The learned Commissioner directed the jury that on the authority of *G. Stanley*, 1920, 2 K. B. 235; 89 L. J. K. B. 452; 84 J. P. 119; 64 S. J. 341; 36 T. L. R. 328; 14 Cr. App. R. 141: [preventive detention quashed, sentence reduced]; and s. 10 of the Prevention of Crime Act, 1908, that they must find that the appellant "is a habitual criminal." This theory may be summed up as—once a habitual criminal always a habitual criminal. It therefore became useless to offer any evidence for the accused, and none was offered except accused's own.

(*a*) This report is based on a shorthand report supplied by the courtesy of the Director of Public Prosecutions: the judgments are printed *verbatim*.

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The only point in this case is—is that view correct? Does the section mean that once identity is proved of the man in the dock with the person proved to have been before found a habitual criminal, the jury must automatically find that he is *now* a habitual criminal—however remote in time is that previous finding?

I submit that there is nothing in the section which compels this interpretation. That section is:—

(1) Where a person is convicted on indictment of a crime committed after the passing of this Act, and subsequently the offender admits that he is, or is found by the jury to be, a habitual criminal, and the Court passes a sentence of penal servitude, the Court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that on the determination of the sentence of penal servitude he be detained for such period not exceeding ten nor less than five years, as the Court may determine, and such detention is hereinafter referred to as preventive detention. . . .

(2) A person shall not be found to be a habitual criminal unless the jury finds on evidence (a) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime, whether any such previous conviction was before or after the passing of this Act, and that he is leading persistently a dishonest or criminal life; or (b) that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention.

(4) In the proceedings on the indictment the offender shall in the first instance be arraigned on so much only of the indictment as charges the crime, and if on arraignment he pleads guilty, or is found guilty by the jury, the jury shall, unless he pleads guilty to being a habitual criminal, be charged to enquire whether he is a habitual criminal, and in that case it shall not be necessary to swear the jury again.

Thus, many years after such a finding, he may again, on conviction, run the risk of penal servitude or preventive detention.

[AVORY J.: A risk which need not be contemplated if the learned judge who tries the case does his duty.]

It is not a negligible risk.

The decision in *Stanley* interprets the words of the s. "shall not, unless" as if it said "shall, if."

It is important to observe that the Legislature has carefully abstained from a definition of habitual criminal, though it would have been easy to frame one (and common enough in statutes, *e.g.*, the Habitual Drunkards Act, 1879).

The reading of the section, I contest, is as logical as if in s. 3 of the Criminal Law Amendment Act, 1885, "no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular, &c." This was said to mean "if the witness is corroborated in the material particular he must be convicted of the offence" If there is in this section a definition my argument falls to the ground.

[ROWLATT J.: You say that definitions are not put in the terms of conditions?]

Yes, exactly. I might cite, too, s. 30 of the Children Act, 1908.

There is no definition of habitual criminal precisely because it is a popular expression which anyone of ordinary sense can understand, *i.e.*, it is for the jury. The Court ought not to accept the interpretation put on this section below unless it is driven to it; it ought to require explicit words for such a proposition.

[The LORD CHIEF JUSTICE: The Legislature has hedged this penalty about with various safeguards; the question is, do they amount to a definition? It is, by the way, not quite correct to call the allegation of being a habitual criminal that of an "offence."]

Hunter, 1921, 1 K. B. 555; 15 Cr. App. R. 69: preventive detention quashed: decided that it is a "status," not an offence.

[The LORD CHIEF JUSTICE: In a statute which twice over enacts that it is for the jury to find whether the accused is a habitual criminal or not.

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AVORY J.: Perhaps the Legislature was thinking of a person incapable of reforming, as is shown by his relapsing into crime even after a long interval.

BAILHACHE J.: There is a material difference between (a) and (b). In (a) it is an essential part of the allegation that accused is *still* leading a dishonest, &c. life; in (b) it is not. (a) is in the present, (b) in the past tense.

McCARDIE J.: But is not the question for the jury not whether he was, but whether he is a habitual criminal?]

Yes.

[ROWLATT J.: Perhaps the statute has, clumsily, made (b) the definition of the issue for the jury.]

Non constat that they must find in the affirmative because one of the conditions precedent is satisfied. The statute has chosen here to use words of condition, and I insist on that.

[ROWLATT J.: In drafting Acts there is the substantive enactment, there is the proviso, and there are the conditions, and the draftsmen all use provisoes and conditions in their own mind as if they were a substantive enactment; it is the vice of many Acts.]

Of course, the Legislature might deliberately be less tender to a person once found to be a habitual criminal, and might not extend the same protection to him as to one who is being so alleged for the first time.

[The LORD CHIEF JUSTICE: Or the Director, when he has enough material, gives notice under (a), and when there is a gap, under (b), leaving it to the accused to show that he is not a habitual criminal.]

But that would throw the *onus* on him to show that he is not, when once the *primâ facie* case is made.

[The LORD CHIEF JUSTICE: But then a door is left open to the

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jury in (b) as well as in (a) if he can explain satisfactorily what he has been doing in the past years.]

The Act cannot drive the Court to the absurdity of saying that a man who for thirty years has led an honest life and then relapses is a habitual criminal.

[LUSH J.: Here the judge ruled as a matter of law that appellant was such a person.

The LORD CHIEF JUSTICE: The allegation might be one not even of criminality, but only dishonesty. Might not the jury say "in that we will not find *habit*"?]

No judge can lay down as law, "You must convict," even under (a).

[AVORY J.: "Persistently" cannot be a term of law, it must be a matter for the jury.]

Appellant was told in terms that it was quite useless for him to give evidence.

[MCCARDIE J.: If the jury finds "status" and not an "offence," it is difficult to see how in this allegation the accused comes within s. 1 of the Criminal Evidence Act: A person charged with an *offence* may give evidence.]

I am not prepared to argue that point. Still, even if he cannot go into the box, he may wish to call witnesses.

Counsel cited *W. Davis*, 1917, 2 K. B. 855; 34 T. L. R. 25; 87 L. J. K. B. 119; 13 Cr. App. R. 10 (*a*): where Sankey J. referred to an unreported case of *Collins*.

[The LORD CHIEF JUSTICE: *Stanley* was not represented.]

It was not argued for the appellant as such. In fact, I have found no precedent for my submission to-day.

(*a*) Add *G. Harris*, *ib.* 189: sentence reduced.

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[ROCHE J.: We must deal with the case before us on its merits. We may have to consider the proviso to s. 4.]

I cannot assist the Court whether it should in this case apply the proviso to s. 4 of the Act.

Travers Humphreys (with him *H. C. Fenton*) for the Crown. There is another case under this section in Scotland, *His Majesty's Advocate* v. *M'Donald*, 54 Sc. L. R. 96: 1916; Sc. Sess. Cas., 1917: 17, in the High Court of Justiciary, the judge at the trial held that the Court having proved a previous conviction as a habitual criminal, the jury "must ignore the evidence of his honest living," and the Court above—Lord Justice Clerk, Lord Dundas and Lord Guthrie—upheld this decision.

That is my case. I say, "once a habitual criminal always a habitual criminal" in law. After that the only issue for the jury is identification.

I submit that hardship is for the Legislature, not for this Court, when the words of the statute are plain.

The Director, in fact, does not indict if there is a long interval between the charges.

[AVORY J.: You cannot indict as a habitual criminal unless you indict for a primary crime—another safeguard.]

"Status" may have been an unfortunate expression to import into these cases, but I am still bound by *Hunter* (above).

[The LORD CHIEF JUSTICE: There may be an intermediate stage between "crime" and "status."]

By an Act of 1827 still in force, a sentence of penal servitude for life may be imposed at any time on a conviction for felony after a previous conviction for felony: 7 & 8 Geo. 4, c. 28, s. 11.

[AVORY J.: And an attaint of felony lasted for life.]

Since 1840—the Beer House Act—a man convicted of felony cannot ever hold a licence: 3 & 4 Vict. c. 61, s. 7.

[The LORD CHIEF JUSTICE: *Totidem verbis.*]

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Yes, but repeated in the Licensing Act of 1910: 10 Edw. 7 & 1 Geo. 5, c. 24.

Everything really depends on how you interpret (a)—does it not mean that if the jury find the essential elements of (a) they must find the accused a habitual criminal?—and so they must in (b).

Parliament, I submit, has assumed that a jury does not know what a habitual criminal is. The Scottish case says in terms, you have here a "definition." Otherwise there is no definition.

The unreported case of *Collins* I have read, but it does not help us. About this particular appellant I have no point to put.

Unless the Court says that having given notice under (b) they are entitled to give further additional evidence, (b) becomes useless, and there will be no prosecutions under it.

Since *Stanley's* case (above) there have been seventeen persons found to be "habituals," following on that ruling; some pleaded guilty. There have been twenty-seven cases of convictions after a previous conviction as such, and in at least fifteen the decision in *Stanley* has been followed in this Court. I have no figures of cases which have not come here.

Oliver in reply. The basis of my argument is not hardship but illogicality. It is illogical, unless the Legislature has expressly stated it, to say that a man is something which he is not.

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The LORD CHIEF JUSTICE read the following judgment: I am asked to say that Horridge, Lush, McCardie, Roche, Greer, Swift and Branson JJ. concur in the judgment which I am about to deliver.

This appellant pleaded guilty at the Central Criminal Court to counts in an indictment charging him with burglary, stealing and receiving, and uttering a forged cheque. He was also found to be a habitual criminal. In the result he was sentenced to three years' penal servitude and five years' preventive detention. The statutory notice given by the Director of Public Prosecutions was based primarily, but not exclusively, on the proposition set out in s. 10 (2) (b) of the Prevention of Crime Act, 1908, and stated that on September 6th, 1917, the appellant was found by a jury to be a habitual criminal, and was then sentenced to six

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years' preventive detention. The statutory notice added that evidence might also be given of a long series of previous convictions against the appellant. At the trial, upon proof, set out in the notice, being given that the appellant had already been found to be, and had been sentenced as, a habitual criminal, he was informed by the Court that evidence upon his part was "of no avail," and the jury was directed that it was compelled to find that he then was a habitual criminal. The appellant appeals against that finding.

It is said on the part of the prosecution that in a case where the notice served on the prisoner contains the statement set out in s. 10 (2) (b) of the statute, the only question is one of identity —namely, is this prisoner the same person as the one who was previously found to be a habitual criminal and sentenced to preventive detention? If that question is answered affirmatively, it is contended that the jury has no choice in the matter, that its verdict becomes purely automatic, that no other question arises, and no other evidence is admissible, and that the jury is bound to find as a fact that the prisoner still is, at the time when the verdict is given, a habitual criminal.

This result, it is said, follows from the judgments given in three decided cases. Those cases are *Collins,* which is not reported: *Davis,* 1917, 2 K. B. 855; and *Stanley,* 1920, 2 K. B. 235. But an examination of those cases seems to show that the proposition is not accurate. In *Davis* the question was not whether in such a case the jury must, but only whether it might, find that the prisoner was still a habitual criminal. And it appears from the passage in the report of that case in which the decision in the unreported case of *Collins* was referred to in argument (1917, 2 K. B. at 856), that that also was a decision to the same limited effect. In other words, each of those two cases turned upon the question, not whether in such circumstances the jury was bound to decide against the prisoner, but whether, if the jury thought fit in all the circumstances of a particular case, it was sufficient for the prosecution to prove that the prisoner had formerly been found to be a habitual criminal, and as such had been sentenced. The difference, and it is a noteworthy difference—and, indeed, the essence of the matter—appears, for the first time, in the decision in *Stanley* (above). In that case, undoubtedly, it was argued, and the Court held, that such evidence was not only sufficient, but

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also unanswerable; or, in other words, that where the prosecution choose to treat the proposition set out in s. 10 (2) (b) of the statute as the ground, or one of the grounds, of the charge that the prisoner is a habitual criminal, he has, and can have, no answer apart from the simple question of identity, and the jury, subject only to that question, has no alternative but to return a verdict against him.

That decision is entitled to great respect. But two points are to be observed. The first is that in that case the appellant, the prisoner, was not represented, and no argument was addressed to the Court by counsel on his behalf. The second is that the judgment purports to be based on the judgments in the earlier cases of *Collins* (above) and *Davis* (above), and neither contains nor suggests any reason for going beyond what the judgments in those cases laid down. "Can" appears to become "shall," "may" appears to become "must," but for reasons which are not explained. The question here is whether the judgment in *Stanley* is to be followed. If it is to be followed, the true proposition, no doubt, is that which has been contended for by the prosecution in the present case—namely, that as soon as it is decided to include in the statutory notice the statement contained in s. 10 (2) (b), it is made certain beforehand that the jury, subject only to the question of identity, must find against the accused.

It was suggested in argument that the question is really of no importance and has merely an academic interest. But it is not possible to accept that view. The statute which has to be interpreted was enacted, it is true, no more than sixteen years ago. But it is not a statute enacted for a limited period, and fifty years hence, should the argument for the prosecution be sound, although a man may have been living honestly for the next preceding forty years, a jury may, if he then lapses once, be compelled to find that he is still a habitual criminal because he was so found half a century before. It is said that in such a case, although the prisoner is found to be a habitual criminal, it is not necessary that he should be sentenced to a further period of preventive detention. That observation is no doubt true. But it affords no reason for a finding that the prisoner is a habitual criminal unless the clear provisions of the statute are such as to include him. As was said by Wright J. in *London County Council* v. *Aylesbury Dairy Company*, 1898,

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1 Q. B. 106, at p. 109: "I have certainly always understood the rule to be that, where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language."

The question is, therefore, what does the statute mean? Now it is to be observed that by s. 10 (1) the provisions concerning detention of habitual criminals apply only in cases where, after conviction for a crime, "the offender admits that he is, or is found by the jury to be, a habitual criminal." That is to say, unless the offender makes the admission, it is in each case a question, not of law for the judge, but of fact for the jury, whether the offender is a habitual criminal. Then sub-s. (2) of s. 10 enacts that "a person shall not be found to be a habitual criminal unless the jury finds on evidence" one or other of two things (a) or (b). Here, again, the statute seems deliberately to make it plain that the question is one of fact for the jury, to be determined by the jury on evidence. Sub-s. (1) has already enacted that, in the absence of an admission on the part of the offender, it is for the jury to find whether he is a habitual criminal. It follows that when sub-s. (2) provides that "a person shall not be found to be a habitual criminal unless" one must read in the words "by the jury" after the word "found," so that the opening words of sub-s. (2), when they are written out in full, read in this way:—"a person shall not be found by the jury to be a habitual criminal unless the jury find on evidence"—(a) or (b). The question for the jury seems always to be the general question, Is this offender a habitual criminal? and the jury must not answer that question in a sense adverse to the offender unless, at least, it is satisfied of the truth of one or other of the two propositions (a) or (b). In other words, the affirmative answer of the jury to the general question must at the least be founded upon, and involve, an affirmative answer to the particular question. This view of the matter seems to be strengthened by the remaining provisions of the section. It is, for example, provided by sub-s. (3) that in any indictment under the section "it shall be sufficient to state that the offender is a habitual criminal," that is to say, the general proposition, and in sub-s. (4) the question for the jury appears to be expressly defined and set out in these exact words, "the jury

shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal," that is to say, the general question. Some difficulty appears to have arisen in the course of the present controversy because it seems in some quarters to have been thought that the two propositions (a) and (b) set out in sub-s. (2) contain in themselves a complete and exhaustive, though alternative, account of the grounds on which the charge that the offender is a habitual criminal may be founded. But in our opinion this view cannot be sustained. The closing words of sub-s. (4) make it reasonably plain that no such limitation is intended. On the contrary, the words are quite general, namely, "the notice to the offender shall specify the previous convictions and the other grounds [in the plural] upon which it is intended to found the charge." If these words are read side by side with the propositions (a) and (b) contained in sub-s. (2), and the issue formulated in sub-s. (4), it is apparent that the notice may contain any grounds upon which the jury may reasonably be asked to come to the general conclusion that the offender is a habitual criminal, but, in order to be effective, those grounds must at least contain sufficient material to enable the jury to be satisfied in particular of the truth of proposition (a) or of proposition (b). And, indeed, in the present case, as has already been mentioned, although the statutory notice contained proposition (b) it went on to mention a series of previous convictions. More than that, by sub-s. (5) of the same section it is expressly provided that "without prejudice to any right of the accused to tender evidence as to his character and repute, evidence of character and repute may, if the Court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a dishonest or criminal life." In these words there is nothing to say or to suggest that where the statutory notice is directed primarily or exclusively to proposition (b) in sub-s. (2), the accused is debarred from giving or tendering evidence on his own behalf. The words of sub-s. (5) seem clearly to point to the opposite conclusion.

The general question, Is this offender a habitual criminal? is, and must always be, in the absence of admission, a question of fact for the jury to determine. But if it really is a question of fact for the jury, it seems a little remarkable that it should be the duty of the judge—as the argument for the prosecution here

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contends—to leave the question of fact to the jury by the unusual method of directing the jury to find a verdict against the accused. The argument for the prosecution appears manifestly, and, indeed, admittedly, to involve at least three contentions:—(1) That the words in s. 10 (2) "shall not be found . . . unless" mean "shall be found . . . if"; (2) that the words introduced in this way are intended to be alternative definitions of the term "a habitual criminal"; and (3) that although the question is made by the statute a question of fact for the jury, nevertheless, if the evidence is such as to establish what is set out either in proposition (a) or in proposition (b) in s. 10 (2), it is the duty of the judge to direct the jury as matter of law to determine the question of fact in a sense adverse to the accused.

There is, in our opinion, no sufficient warrant for these contentions. The words "shall not be found . . . unless" seem clearly to lay down certain conditions precedent, or safeguards, and are not apt words to express a definition. The use of words of qualification, exception, proviso, or condition to convey by themselves a substantive affirmative proposition is always inaccurate as a form of diction. There are no doubt varying degrees of harshness. Examples are "no one except . . . is," "never . . . except when," "is not . . . unless," and "shall not be found . . . unless." Perhaps the last form is the harshest, and it is the form to be dealt with in the present case. It would be easier to extract an affirmative out of the words "no one is a habitual criminal unless he is," &c. In our opinion the view that sub-s. (2) contains a definition is contradicted as well by the words themselves as by the scheme and the language of the whole section and its various parts. It may be observed that the supposed definition relates to, and deals only with, the functions of the jury, and leaves untouched and undefined the habitual criminality to which, it is contemplated, a prisoner may plead guilty.

Moreover, it is not seriously contended here that the language of the section considered as a whole is not capable of a construction which avoids the consequences that flow from treating the words referred to as a definition. It is not necessary to dwell upon the presumptions against the view that a statute intends what is unreasonable, unjust, or absurd. The rule is clear that when the language of a statute admits of more than one construction, and if it be construed in one way would lead to obvious injustice,

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the Courts act upon the view that such a result could not have been intended unless the intention be manifested in express words.

And as was said by Lord Esher, *In re North, Ex parte Hasluck*, 1895, 2 K. B. 264 at 271, "there is the rule of construction that if a statute which so affects a man's status as to be in effect a penal enactment is capable of two constructions, that one should be adopted which is most favourable to the person affected"; or, again, in the words of Lord Abinger, in *Henderson* v. *Sherborne*, 2 M. & W. at 239, "The principle adopted by Lord Tenterden that a penal law ought to be construed strictly is not only a sound one but the only one consistent with our free institutions. The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject, and I hope will always remain so."

It is said, by way of suggested comparison, that in every case where a prisoner, after being convicted of an offence, is called upon to admit a previous conviction and denies it, the jury has the same function as that which the argument for the Crown would permit to the jury in the present case. But it is tolerably clear that the implied argument is an argument in a circle. In the cases where the sole question is whether the defendant was the person previously convicted, it is obvious, *ex hypothesi*, that there is no other question. But, in the examination of the difficulty involved in the present case, the *crux* of the matter is precisely the inquiry whether there is not another and larger question than the question: Was the defendant the person who was previously found to be a habitual criminal? In other words, the controversy here is whether, on the true construction of the statute, there is not for the jury a question other than the question of mere identity. That controversy is not illuminated by the statement that where the sole question is one of identity no other question arises.

It is further contended that it must be right to direct the jury that it has no choice in the matter where the statutory notice contains proposition (b) because (it is argued) it must be right to direct the jury that it has no choice in the matter where the notice contains proposition (a) of s. 10 (2), and the evidence is such as to establish the proposition. But this argument appears to rest upon no sufficient foundation. The requirements of proposition (a) are satisfied in full as soon as it is proved, for example,

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that the defendant was three times convicted after the specified age, and that he is leading persistently a dishonest life. The words are "dishonest *or* criminal," not "dishonest *and* criminal," and the words are "*is* leading persistently" not "has since the last of such convictions been leading persistently." Yet it might well be that a jury should, and would decline to find the defendant to be a habitual criminal if he succeeded in establishing, for example, that for many years after the last of the three convictions he had lived an honest life, or that the convictions, or some of them, were for comparatively minor offences, or that they or some of them were separated by such an interval of time as not to point to a habit. Certainly it has not yet been suggested that evidence to that effect would be irrelevant, though in the present case the defendant was informed, and, if the argument for the Crown be correct, was rightly informed, that it would be a mere waste of time for him to offer to the jury evidence relating to his mode of life after his release from preventive detention. Where the statutory notice is given with special reference to proposition (a) in s. 10 (2), and the evidence proves the proposition, nevertheless the offender may rightly be found not to be a habitual criminal. To take an illustration, a man of fifty years of age may be found to have been three times convicted of crime between the ages of sixteen and twenty-five years, and the evidence may prove that he is leading persistently a dishonest life by persistently pretending to be in holy orders, or to be a qualified medical man. Yet the jury might say, and say properly, that he was not the sort of person the Act was aimed at, and that he ought not because he had committed some fresh offence to be found to be a habitual criminal. It was suggested in argument that the term "habitual criminal" is a term which, taken by itself, is extremely vague and difficult to understand. But under the provisions of this statute the jury has not the task of inquiring whether the offender is a habitual criminal if he himself admits that he is one. It does not seem to be an extravagant view to suppose that, in the judgment of the Legislature, a jury, no less than a prisoner, might be expected without undue difficulty to appreciate the difference between a man who commits a crime and a man who is in the habit of committing crime.

Our attention was directed to the decision of the Court in *Hunter*, 1921, 1 K. B. 555. That decision, it was said, involved

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the conclusion that when once a jury has found a prisoner to be a habitual criminal, and he has been sentenced to preventive detention, he thereby acquires, and can never get rid of, the permanent "status" of habitual criminal. But it is apparent that that case was concerned with a very different question, namely, whether the allegation that a man is a habitual criminal is a charge of an offence or crime, or whether it merely asserts "a status or condition in him." The words "status or condition" were used in that context merely to indicate something antithetical to offence or crime, and no question of permanent status was so much as suggested. The "status" or "condition" referred to was the "status" or "condition" at the particular time only. Reference was also made in argument to a Scottish case, the case of *Macdonald*, 54 Sc. L. R. 96, where it appears to have been thought that the words in s. 10 (2) of the Prevention of Crime Act, 1908, contain a definition of the term habitual criminal. That decision also is entitled to be treated with great respect. But it would seem to be based entirely upon a view that the statute must contain some definition of the term habitual criminal, and that, in the absence of anything better, the words "shall not . . . unless" ought to be treated as if they were "shall . . . if," and amounted to a definition. We are of opinion, however, for the reasons already stated, that the Legislature, as in such a matter is not, perhaps, unnatural, has deliberately refrained from a definition, and has left to the jury the question whether the prisoner is a habitual criminal, taking care, however, to provide that he must not be so found unless, at the least, one or other of two conditions precedent shall have been fulfilled.

It remains to refer to the last argument adduced on the part of the prosecution. It is said that, if the view urged on the part of the appellant is correct, that part of s. 10 (2) which contains proposition (b) becomes "unworkable," and, indeed, futile. But on examination it seems clear that this argument ought not to succeed. It is based on the erroneous view that s. 10 (2) (a) and (b) purport to state alternatively and to exhaust the grounds of the statutory notice. More than that, where the prosecution have in their possession materials which may establish proposition (a) they have no need for proposition (b). In other words, they are, *ex hypothesi*, in a position to prove not only certain previous con-

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victions, but also that the offender is (in the present tense) leading persistently a dishonest or criminal life. Their evidence, that is to say, is such as to cover the period leading up to the indictment. But it may be that in a particular case such evidence is not forthcoming, although the offender has been previously found to be a habitual criminal, and detained as such, and although there is good reason for the suspicion that he has since been, and still is, leading persistently a dishonest or criminal life. In such a case it may well be thought right to serve a notice with special reference to proposition (b), and if that course be taken, and if the fact be proved that the offender was previously found to be, and was detained as a habitual criminal, the condition precedent which enables the jury to come to a conclusion is satisfied. But there is nothing to prevent the offender from offering evidence. It is this compendious fulfilment of a condition precedent, and not something else, which appears to be referred to in the judgment in *Davis* (above), as giving rise to possible hardship. In all such cases it is tolerably obvious that much may depend on the length of the interval elapsing between the date of release from preventive detention and the date of the further charge under the statute. That interval may be weeks, or months, or years, and even many years. In each case it is, in our opinion, a question of fact for the jury to decide whether the charge that the offender is (not was) a habitual criminal is established.

In our opinion, therefore, a direction was in the present case given to the jury which was too unfavourable to the appellant, and he was prevented from giving evidence on his own behalf. But it might, nevertheless, be contended that no substantial miscarriage of justice has actually occurred, and that the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, ought to be applied. That contention would involve the argument that, in view of the undoubted facts relating to the criminal career of the appellant, the jury, upon a proper direction, could not rightly have done otherwise than have come to the same conclusion as that to which it came in the actual course the trial took. There is, it is clear, much to be said for that contention. Upon the whole, however, in view of all the circumstances, we do not think it necessary or desirable to apply the proviso to the facts of the present case. In the result, therefore, the appeal is allowed, and the sentence of preventive detention is quashed.

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AVORY J.

AVORY J. read the following judgment (*a*): I am requested to say that Rowlatt, Bailhache and Shearman JJ. concur with me that this appeal should be dismissed.

With profound respect for the judgment just delivered, apart from the question whether this Court has the power, and if it has, whether it is expedient to overrule the express decision in 1920 of the question at issue in this appeal, I think the case of *Stanley* was rightly decided, and that any hardship which is suggested as arising from that decision should be remedied by the Legislature. In my opinion s. 10 of the statute of 1908 should be construed in view of the fact that it is not one creating an offence, but one giving power to impose a particular punishment upon the class of offenders who are brought within its ambit, as was decided by this Court in *Hunter* (1921), a decision which is not now impugned, and viewed in this light the suggested hardship to a great extent, if not entirely, disappears. Taking the illustration given in the argument of the man who has led an honest life for many years after coming out of preventive detention, and who again commits a crime, it is in the last degree improbable that any Court would again sentence him to preventive detention, and if it did this Court would in a proper case review the sentence. It is not sufficient under para. (b) of sub-s. 2, to prove that the accused has previously been found to be a habitual criminal, but it must also be proved that he was in addition sentenced to preventive detention, and has again committed a crime, and the Legislature may well have intended that such a person, by falling again into crime, has shown himself to be incapable of reform, and therefore resumes or retains the character or status that he had acquired.

In my opinion the true effect of sub-s. 2, paras. (a) and (b) of the statute is to define in the alternative the conditions under which a person becomes a habitual criminal, in other words, if the conditions in either (a) or (b) are satisfied by proof, the jury has no option but to find that the accused is a habitual criminal, as was decided in the Scotch case in 54 Scottish Law Reporter, a decision in which I entirely concur. It does not follow in either case that the accused ought to be sent to penal servitude or preven-

(*a*) This is the second dissenting judgment under section 1 (5) of the Criminal Appeal Act: see *Kerr*, 15 Cr. App. R. 165: 1921.

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tive detention. I think the statute was framed in the negative form, "unless, &c.," instead of the affirmative, "if, &c.," in order to guard against the jury putting their own interpretation on the expression and finding a person to be a habitual criminal merely because he has been several times convicted, and the fact that the jury, when the proceedings are based solely on para. (b), may have only to determine the question of identity, as they have to do when a previous conviction is charged in the indictment and disputed, and in many other cases, does not appear to me to justify reading into para. (b) words or conditions which are not there.

On behalf of the appellant it is suggested that proof of the conditions under para. (b) merely establishes a *primâ facie* case against the accused which it is open to him to rebut, but if so, having regard to the disjunctive "or" between (a) and (b), why does not proof of the conditions under para. (a) merely establish a *primâ facie* case? I cannot suppose that it would be open to the jury to find that the accused is not a habitual criminal, although they were satisfied that all the conditions in para. (a) had been established by the evidence, the word "dishonest" in that paragraph being used, I think, to cover offences against the law which are not necessarily "crimes" within the definition of the statute.

For these reasons I think the appeal should be dismissed.

Conviction as habitual criminal quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ROCHE AND MR. JUSTICE SWIFT.

HAROLD HERBERT GEORGE TOWNSEND.

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2 *June.*

The term of first sentence to penal servitude must depend on the circumstances: there is no general rule that it is three years.
Severity of sentence.

Appeal against sentence.

Appellant, who was not present, pleaded guilty at Manchester Assizes to housebreaking, and was sentenced on May 13th, by Talbot J., to five years' penal servitude.

No counsel appeared.

The LORD CHIEF JUSTICE said that the appellant entered a house by breaking a scullery window, and stole jewellery valued at £36 and a small sum of money. His record was not a good one. He began stealing at the age of twelve, was later sent to a reformatory, had been fined for stealing in the army, had deserted, and had been imprisoned for twelve months for housebreaking, when ten cases were taken into consideration. He was arrested in February, 1922, and sentenced to twenty-one months' imprisonment with hard labour for housebreaking and larceny, and upon his release went to sea as a steward, his discharge being marked "very good." He said that when he committed the present offence he had been out of employment for two months, and was not entitled to unemployment benefit; and that he committed the offence when he was starving.

This man, who was only twenty-four years of age, was sent to penal servitude for the first time and sentenced to five years. It must not be thought that there is any rule, or even any presumption, that where a man is sent to penal servitude for the first time the appropriate sentence is three years. It was stated

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quite clearly by this Court in *Mayes*, 12 Cr. App. R. 178: 1916, that no rule was laid down about a first sentence of penal servitude. In each case the task of the Court is to assign a punishment suitable to the facts of the particular case. The mere statement that here was a sentence of five years' penal servitude which was the first term of penal servitude, is of no force; but in looking at the facts one sees that here is a young man, and that in spite of many sentences he did make a real effort to retrieve his character. He worked well at sea, and his discharge was marked "very good." Having regard to all the circumstances, the Court is of opinion that a sentence of penal servitude was not necessary, and that this sentence may suitably be reduced to a sentence of the same length as the last, namely, twenty-one months' imprisonment with hard labour. The appeal would be allowed to that extent and the sentence reduced accordingly.

Sentence reduced.

W. E. H.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE ACTON.

23 *June.*

REGINALD CHARLES SYMONDS.

A defendant is entitled under s. 1 (g) of the Criminal Evidence Act, 1898, to give his evidence from the witness box. The Court in ordering otherwise must exercise a judicial discretion.

Proviso to s. 4 of the Criminal Appeal Act applied.

Application for leave to appeal against conviction and sentence.

The applicant (who was not present) was convicted on May 20th, 1924, before the Common Serjeant, at the Central Criminal Court, of bigamy, and was sentenced to three years' penal servitude. He applied for leave to appeal against conviction and sentence.

No counsel appeared.

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SWIFT J., in delivering the judgment of the Court, referred to the fact that the applicant at his trial had given evidence from the dock and had been cross-examined while standing there, and continued:—This was an unusual course for the trial to take and an improper one. The obvious intention of the Criminal Evidence Act, 1898, is that an accused person shall have an opportunity of giving evidence on his own behalf in the same way and from the same place as the witnesses for the prosecution. It is not right to deprive him of the benefit of the statute. There may be cases in which a prisoner is so infirm that he cannot walk from the dock to the witness box without inconvenience or pain. There may be cases where the prisoner exhibits violence which may be more easily quelled in the dock than in the witness box. But apart from cases of such a nature the right of the prisoner to give his evidence from the witness box should not be interfered with; and in this case we see no ground upon which the Court should have, in the exercise of its judicial discretion, ordered that the defendant should give his evidence from the dock. Having regard, in the present case, however, to the overwhelming evidence against the applicant, we cannot think that any prejudice resulting from his being cross-examined while in the dock affected the verdict of the jury. This application will, therefore, be refused.

Application refused.

G. B.

VICTOR QUINTON CLIFTON.

Severity of sentence.

Appeal against sentence.

The appellant (who was present) was convicted on April 10th, 1924, before the Chairman, at Carnarvonshire Sessions, of larceny and false pretences, and was sentenced to five years' penal servitude. He appealed against his sentence.

No counsel appeared.

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The LORD CHIEF JUSTICE: In this case leave to appeal against sentence was granted by the full Court. The indictment charged the appellant with three offences—obtaining credit by false pretences, stealing jewellery, and stealing an overcoat. It is not necessary that I should recapitulate the facts of the case. The indictment was peculiar; the method observed at the trial was peculiar; and the true conclusion to be drawn is that the appellant was found guilty on evidence of such a larceny as in the case of a first offender would have led to the prisoner's being bound over. The appellant is not a first offender. He has an unfortunate record, but in the opinion of the Court the justice of the case will be met by reducing this sentence to one of three months' hard labour to date from the conviction.

Sentence reduced.

G. B.

WILLIAM LEE MERRILL.

If the previous convictions warrant a sentence of preventive detention, the youthfulness of the prisoner is no bar.

Appeal against sentence.

The appellant (who was present) was convicted on May 20th, 1924, before the Recorder, at the Central Criminal Court, of burglary, and was sentenced to three years' penal servitude. He was also found to be a habitual criminal and was sentenced to five years' preventive detention. He appealed against his sentence.

No counsel appeared.

The LORD CHIEF JUSTICE: The appellant is only 28 years of age. He has never been sentenced previously to a term of penal servitude. Between March 1st, 1909, and October 5th, 1922, he had, however, a record which it is astonishing that any man of his age should have. During that period he was convicted on eleven occasions of crimes of dishonesty, and was sentenced to varying terms of imprisonment, the longest of which were two sentences of eighteen months' imprisonment with hard labour imposed in 1920 and in 1922. In spite of the fact that he is only

28 and that he had never been sentenced to penal servitude before the present case, the Court, in view of his record, sees no reason to interfere with the sentence, and the appeal is, therefore, dismissed.

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Appeal dismissed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE BRANSON.

HERBERT WILLIAM PARKER.

7 *July.*

If this Court is satisfied, in a case where there ought to be corroboration of a charge, that there is not corroboration, it will quash a conviction.

Appeal against conviction.

The appellant was convicted on May 21st, 1924, before Sankey J., at Huntingdon Assizes, of having had carnal knowledge of a girl under sixteen, and was sentenced to twelve months' imprisonment with hard labour.

F. Van den Berg for the appellant. (1) It is open to the Court to regard this case as a whole and to allow the appeal if it comes to the conclusion that it was unsafe to convict. The judge at the trial warned the jury of the need of corroboration of the girl's evidence, but even so this Court will quash a conviction if it thinks that the verdict is unreasonable or that it cannot be supported having regard to the evidence: see *per* L. Reading C.J., *Baskerville*, 1916, 2 K. B. at p. 664; 12 Cr. App. R. at p. 88. (2) The judge left it to the jury to say whether or not there was corroboration instead of directing them that there was no corroboration. [He was stopped.]

F. K. North for the Crown. There was sufficient corroboration here.

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[SHEARMAN J.: You must distinguish between corroboration implicating the accused and pieces of evidence tending to show that the girl was telling the truth with regard to matters to or not directly connected with the offence.]

The LORD CHIEF JUSTICE: One of the grounds of appeal in this case is that there was no corroboration of the evidence of the prosecutrix, but that the case was left to the jury as if there was. The judge at the trial undoubtedly told the jury that it was not safe to convict without corroboration. He added: "If you are satisfied that the story of the girl is true and that it has been corroborated you will find the prisoner guilty." After that, could the jury possibly have supposed that they were being asked to reject the case against the appellant because there was no corroboration, especially as a little earlier, during a discussion with counsel, the judge had said that he could not say that there was no corroboration? In truth, there was no corroboration of the girl's story in the sense of evidence corroborating that story in a material particular and implicating the accused, but the jury were left to decide whether or not there was any corroboration. If the jury had been told that there was no corroboration, and that in the absence of it it would be unsafe to convict, and if they had nevertheless convicted the appellant, it might well have been that the conviction would stand. But their minds were left with the belief that they could find certain matters to be corroboration, whereas they could not. This appeal must therefore be allowed.

Conviction quashed.

Solicitor for the Appellant—*T. Spencer*, St. Neots.

Solicitor for the Respondents—*Peacock & Goddard* for *J. Percy Maule*, Huntingdon.

G. B.

TOM TAYLOR.

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Branson J.

An indictment alleging an offence under a particular section after the words relevant to that offence have been repealed is bad.

Appeal against conviction, on certificate.

The appellant was convicted on June 9th, 1924, before Horridge J., at Gloucester Assizes, of delivering a forged nomination paper, and was sentenced to three months' imprisonment with hard labour.

W. M. Andrew for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was on bail: Appellant was convicted of fraudulently delivering a forged nomination paper to the returning officer for an election of councillors then about to be held for the rural district of Northleach, Gloucestershire. The count of the indictment in which he was charged was as follows:—

STATEMENT OF OFFENCE.

Delivering a forged nomination paper contrary to s. 74 of the Municipal Corporations Act, 1882.

PARTICULARS OF OFFENCE.

Tom Taylor on March 19th, 1924, at Northleach, in the County of Gloucester, fraudulently delivered to John Herring Stevens, the returning officer for the election then about to be holden of councillors for the rural district of Northleach, in the county aforesaid, a nomination paper, well knowing the same to be forged, purporting to nominate one Alice Organ as a candidate for the said election, well knowing the same to be forged.

It is submitted that the indictment was bad because (a) the Municipal Corporations Act, 1882, refers only to Municipal Borough Council elections, and the present case deals with a Rural District Council election; (b) the essential words in s. 74 of the Act of 1882 have been repealed by s. 20 of and the Schedule to the Forgery Act, 1913, taken in conjunction; (c) the Act of Parliament upon which the prosecution relied should have been stated in the indictment; and (d) if it is contended that the Local Government Act, 1894, and the Rules contained in the Rural District Councillors' Election Order, 1898,

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which was made under the Act of 1894, operate to keep alive the essential words of s. 74 of the Act of 1882, that Order has been impliedly repealed by the Forgery Act, 1913.

The judge gave a certificate that the case was fit for an appeal "that it may be decided whether or not s. 74 of the Municipal Corporations Act, 1882, is still applicable to the election of a Rural District Councillor, or whether it has been impliedly repealed by the Forgery Act, 1913, which by s. 20 and the Schedule repeals portions of s. 74 of the Municipal Corporations Act, 1882, but does not repeal any portion of the Local Government Act, 1894, or the Orders made thereunder."

Earengey for the Crown. If it is essential in every case that the correct Act of Parliament under which a prisoner is charged should be inserted in the indictment, the indictment in the present case is clearly bad. It was not settled by counsel, and application was made at the trial that it should be amended, but leave to amend was refused. There are, however, admittedly no merits in the appellant's case, and it is submitted that the Court may take the view that there has been no substantial miscarriage of justice and dismiss the appeal under the proviso to s. 4 of the Criminal Appeal Act, 1907.

The LORD CHIEF JUSTICE: The indictment in this case was laid under s. 74 of the Municipal Corporations Act, 1882. It did not mention the Local Government Act, 1894, or the Forgery Act, 1913. Undoubtedly under s. 74 of the Act of 1882 it was a criminal offence to deliver to a town clerk any forged nomination paper, with knowledge that it was forged, but by s. 20 of and the Schedule to the Forgery Act, 1913, the words in the section creating that offence were repealed. It is not suggested that those words were repealed so that an act which previously had been an offence constituted an offence no longer. But it is said that a simpler way of indicting the accused in such a case was provided by the Forgery Act, 1913. On the other side it has been argued that Rural District Councils were created by the Local Government Act, 1894, by s. 24, sub-s. (4) of which it was provided that the provisions of the Act with respect to the election of guardians should apply to district councillors, and by s. 20, sub-s. (5) it was provided that the election of guardians

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7 *July.*

TOM TAYLOR.

Hewart L.C.J.

should, subject to the provisions of the Act, be conducted according to Rules framed under the Act by the Local Government Board. S. 48, sub-s. (2) provided that such Rules should, notwithstanding anything in any other Act, have effect as if enacted in the Act of 1894, and s. 48, sub-s. (3) provided that elections of District Councillors under the Act of 1894 should be subject to the provisions of s. 74 of the Act of 1882. On January 1st, 1898, an Order was made by the Local Government Board containing certain Rules to govern the election of Rural District Councillors. No. 25 of these Rules dealt with the adaptation of the Municipal Corporations Act, 1882, to Rural District Council elections, and Schedule IV. set out the section of the Act of 1882 under which the indictment in the present case is drawn.

It is contended that, as the vital provisions of the Act of 1882 have been repealed by the Forgery Act, 1913, the indictment is bad, since the offence created by s. 74 of the Act of 1882 has, in that name, at any rate, ceased to exist. That argument has not seriously been resisted by counsel for the prosecution, but it was suggested rather faintly that, notwithstanding the fate which has overtaken s. 74 of the Act of 1882, the words in that section which have been repealed by the Forgery Act, 1913, have a kind of second life so far as they are revived by the Local Government Act, 1894, and that, therefore, if the Rules made under that Act are regarded, the offence created by s. 74 of the Act of 1882 subsists so far as Rural District Councils are concerned, although it does not subsist for the other elections referred to in the Act of 1882. That is a desperate argument. It is as if one were to say that the trunk of a tree has been cut down but certain topmost branches still remain spread in the air. The indictment is clearly bad. It was not amended, and in the opinion of the Court this appeal succeeds.

Conviction quashed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SANKEY.

1924
14 *July.*

REUBEN DANIEL WILSON.

A judge is entitled to question a witness at any stage of his evidence with a view to ascertaining whether he recognises the obligations of an oath.

A defendant witness may in a proper case be asked in cross-examination whether he imputes improper motives to the witnesses against him.

Appeal against conviction.

The appellant was convicted on June 17th, 1924, before Commissioner G. Thorn Drury, K.C., at Chelmsford Assizes, of indecent assault on a male, and was sentenced to twenty-one months' imprisonment with hard labour

E. A. Digby for the appellant. The appellant was convicted of indecently assaulting a boy named Day. It is submitted that the learned Commissioner was wrong in putting certain questions to Day at the close of his evidence. Day was a most unsatisfactory witness, and when he had been examined, cross-examined, and re-examined, the Commissioner put a number of questions to him, in which he asked him whether he knew the religious consequences of giving false evidence. The boy answered in the affirmative, but the effect of the questions was unfairly to rehabilitate him as a witness in the eyes of the jury. Secondly, it is submitted that the appellant was improperly and unfairly cross-examined when he was asked what he suggested were the motives which caused the witnesses for the prosecution to make false charges against him.

[SHEARMAN J.: Those questions are "common form," and they are put to anticipate the defence that the prosecution has been instigated by some malicious person.]

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REUBEN DANIEL WILSON.

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They are admittedly "common form," but there appears to be a great divergence of opinion at the Bar whether they should be put. Cross-examination must be about facts which are relevant to the issue, and the state of mind of a witness regarding other persons is irrelevant. The fact that those questions may elicit the truth is not the test; hearsay evidence may elicit the truth, but it is inadmissible. He referred to Russell on Crimes, 8th ed. p. 2156, and Taylor on Evidence, 11th ed. par. 1434.

Sir Henry Curtis Bennett, K.C., and *H. H. Trusted* for the Crown were not called upon.

The LORD CHIEF JUSTICE: Both sets of questions of which complaint has been made were rightly asked. With regard to the questions put to Day at the end of his evidence, the Commissioner clearly asked them because he saw the importance of ascertaining whether Day had a real sense of responsibility and of the obligations imposed by an oath. It is admitted that the questions could have been asked at the beginning of the evidence, and there is no substance in the argument that they should not have been asked when they were. They could have been asked at any time. With regard to the questions put in cross-examination one must beware of laying down a general rule, but on the facts in the present case, and in view of the defence which was developed early, namely, that the prosecution had been instigated by malicious persons, the questions were quite proper. The general proposition contended for by counsel for the appellant cannot be sustained.

Appeal dismissed.

Solicitor for the Appellant—*Cunliffe, Blake & Mossman* for *Tolhurst & Tatham,* Gravesend.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE BRANSON.

1924
21 *July.*

WILLIAM RICHARD HOBERN.

In a proper case the Court will treat an application for leave to appeal as the final appeal.
Severity of sentence.

Application for leave to appeal against sentence.

The applicant was convicted on July 2nd, 1924, before the Deputy-Chairman at Essex Quarter Sessions, of obtaining credit as an undischarged bankrupt, and was sentenced to six months' imprisonment in the second division.

No counsel appeared.

BRANSON, J.: The applicant was adjudicated bankrupt in 1902. At almost any time during the last twenty years he could have got his discharge. He committed the offence of which he has been convicted because, on returning to business after twenty years, he failed to comply with what he regarded as a formality. He was 56 years of age, and he has lost the gratuity which he received for his Army service. The Court thinks that in the circumstances the sentence was too severe, and that the proper order should be that the applicant be released on his own recognizances to come up for judgment if called on to do so.

Although the matter comes before the Court merely on an application—the application is for leave to appeal against sentence only—the Court will revise that sentence without going through the formality of giving the appellant leave to appeal and making its order on the appeal.

Sentence reduced.

G. B.

EDWIN NORMAN DE VERE DAWSON.

1924
24 *July*.

Hewart L.C.J.
Sankey J.
Branson J.

The Court will not grant leave to appeal against conviction after a plea of guilty pleaded by counsel's advice.

Application for leave to appeal against conviction.

The applicant was convicted on June 30th, 1924, before the Recorder, at the Central Criminal Court, of libel, and was bound over in the sum of £500, and ordered to pay the costs of the prosecution.

Cassels, K.C., and *Myles Elliott*, for the applicant. The applicant at first pleaded not guilty and the trial proceeded. Later, he withdrew his plea and pleaded guilty. In taking that course, however, he was unduly influenced by certain remarks that fell from the Recorder. If an opportunity was now given him to put his case fully before the Court, it might well be that his conviction might be quashed. He pleaded guilty under a complete misapprehension, and because he wrongly felt compelled to do so.

The Crown was not represented by counsel.

Branson J.: The applicant pleaded guilty to the charge against him after full consultation with his legal advisers. In these circumstances it is impossible for this Court to grant him leave to appeal against his conviction.

Application refused.

Solicitors—*Corbin, Greener, and Cook.*

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SANKEY.

1924
28 *July.*

JEAN PIERRE VAQUIER.

The discretion which a judge at a trial has of excluding women from a jury must be exercised judicially, and unless it is shown that it has not been so exercised the Court will not order a venire de novo.

Application for leave to appeal against conviction.

The applicant was convicted on July 5th, 1924, before Avory J., at the Surrey Assizes, of murder and was sentenced to death. Only one point calls for report.

Sir Henry Curtis-Bennett, K.C., and *A. B. Lucy*, for the applicant, who was present (under s. 10 of the Criminal Appeal Act, 1907). Avory J., made an order that the applicant should be tried by a jury composed of men only. He purported to act under s. 1 of the Sex Disqualification (Removal) Act, 1919, 9 & 10 Geo. 5, which provides that a person shall not be exempted by sex from the liability to serve as a juror, but that s. 1 (*b*) "any judge . . . . may, in his discretion, on an application made by or on behalf of the parties . . . . or at his own instance, make an order that the jury shall be composed of men only or of women only as the case may require. . . ." There was, however, no material on which he could have judicially exercised the discretion given to him by that enactment. Since women have become capable of acting as jurors, an accused person has been entitled to have the opportunity of being tried by a mixed jury, unless there is a special reason to the contrary, and there was no such reason here. Even if there was difficulty in finding accommodation in an assize town for a mixed jury, that would not justify a judge in making an order. Paragraph (*b*) of the section is intended to give power to exclude women from a jury which is to try such offences as sexual crimes between males, or to exclude men in a

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28 *July.*

JEAN PIERRE VAQUIER.

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Shearman J.
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case where women alone are concerned. The applicant was not tried by the proper tribunal, and he is entitled to a *venire de novo*.

Sir Patrick Hastings, K.C. (with him *H. D. Roome*), for the Crown, was not called on.

The LORD CHIEF JUSTICE, in the course of his judgment, said: It has been argued that there was an irregularity at the trial, and that women jurors were wrongly excluded from the jury at the instance of the judge. It is clear from s. 1 (*b*) of the Sex Disqualification (Removal) Act, 1919, that a judge has power, "in his discretion" and "at his own instance," to "order that the jury shall be composed of men only or of women only, as the case may require." The fact that the judge had made the order was known to counsel for the defence at the end of either the first or the second day of the trial. No observations were made on it then. No suggestion is now made regarding the ground on which the judge made the order. It is easy to conceive various grounds on which the discretion given to him by that section might have been exercised. It is neither useful nor convenient by illustration to use words that might seem to fetter the discretion which the section bestows. The discretion must be exercised judicially and, therefore, reasonably, and there is nothing in the circumstances of this case to show that Avory, J., did not properly exercise the wide discretion which the section conferred on him.

Application dismissed.

G. B.

THOMAS MICHAEL McKENZIE.

30 *July.*

Severity of sentence on incorrigible rogues.

Appeal against sentence.

The appellant was sentenced on July 2nd, 1924, by the Chairman, at the Essex Quarter Sessions, to eleven months' imprisonment with hard labour as an incorrigible rogue.

No counsel appeared.

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30 *July.*

THOMAS MICHAEL MCKENZIE.

Hewart L.C.J.
Shearman J.
Sankey J.

The LORD CHIEF JUSTICE: The appellant was originally charged before the justices at Stratford with being found in an enclosed area for an unlawful purpose, and as he had on previous occasions been found to be a rogue and vagabond, the justices committed him to the Quarter Sessions for sentence. The appellant really complains to this Court against both his conviction and his sentence, but it has been laid down in *Brown*, 1 Cr. App. R. 85; 72 J. P. 427: 1908; and in *Johnson*, 2 Cr. App. R. 13; [1909] 1 K. B. 439; 78 L. J. K. B. 290; 73 J. P. 135; 100 L. T. 464; 25 T. L. R. 229: 1909, that this Court will not hear an appeal against a conviction as an incorrigible rogue, that appeal being to Quarter Sessions. There is, however, an appeal to this Court against the sentence passed at Quarter Sessions. It appears that in this case there was no evidence given in the police court on which the appellant could properly be convicted as an incorrigible rogue. It is not within the power of this Court to quash that conviction, but the Court can reduce the sentence to a term of one day, which in effect will amount to much the same thing.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT, AND MR. JUSTICE BRANSON.

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19 *August.*

NATHAN CHARLES BLACK.

Mitigation of sentence in view of previous good character.

Application for leave to appeal against conviction and sentence.

The applicant was convicted on July 17th, 1924, before Shearman, J., at the Central Criminal Court, of obtaining money by false pretences, and was sentenced to eighteen months' imprisonment with hard labour.

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19 *August.*

NATHAN CHARLES BLACK.

Hewart L.C.J.
Swift J.
Branson J.

Comyns Carr, K.C., and *H. G. Garland* for the applicant, who was not present.

The Crown was not represented.

The LORD CHIEF JUSTICE, after saying that there was no ground on which to disturb the conviction, continued: With regard to the sentence, it cannot be said to be too severe in view of the prevalence of this offence, which is known as a "long firm fraud." But having regard to the good character of the applicant, the Court thinks that the imprisonment may be served in the second division. As we have thus modified the sentence, it will run from the date of the conviction.

Sentence modified.

Solicitors—*F. Titmuss.*

G. B.

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20 *August.*

JAMES PHILLIPS.

If a direction to the jury treats as corroborative evidence that is not in fact corroborative, the Court may quash a conviction.

Appeal against conviction on certificate.

The appellant was convicted on July 26th, 1924, before Mr. Commissioner Lailey, K.C., at Glamorgan (Swansea) Assizes, of rape, and was sentenced to three years' penal servitude.

Kirkhouse-Jenkins for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. The learned Commissioner gave his certificate that the case was fit for appeal in order that this Court might decide whether or not the finding of the jury was against the weight of evidence. It is submitted that it was. The issue was whether there had been consent by the woman, and the doctor who was called by the prosecution said that her evidence with regard to the circumstances in which connexion took place was utterly impossible. [He was stopped.]

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Vernon Gattie for the Crown. The effect of the evidence was a question for the jury. The issues were pure questions of fact. It is true that the learned Commissioner pointed out one or two matters to the jury which, strictly speaking, were not corroboration of the woman's story, but if the jury is properly warned regarding the need of corroboration in such cases, and there is corroboration, the fact that certain matters which are not corroboration are pointed to as corroboration does not vitiate the conviction. He referred to *Hedges*, 3 Cr. App. R. 262: 1909.

[SWIFT, J., referred to *Lovell*, 17 Cr. App. R. 163; 129 L. T. 638; 27 Cox, C. C. 510: 1923.]

The LORD CHIEF JUSTICE: It is not necessary to repeat the unpleasant details of this case. It is enough to say that the appellant was charged with ravishing a young woman who went to clean the offices of a railway company at a goods station where he was employed. There was no doubt that intercourse had taken place, and the whole question for the jury was whether or not that act amounted to the crime of rape.

There are certain respects in which this trial was not satisfactory. It is enough to mention two of them. First, the doctor who was called as a witness on behalf of the Crown, speaking of the account given by the prosecutrix of the way in which intercourse had taken place, said that in his opinion it was a physical impossibility. He was thereupon allowed, in effect, to be cross-examined by counsel for the Crown on some different terms in which he had dealt with the matter in the police court. Somehow his deposition was put in, and a large portion of it was read to the jury. Counsel who appears for the Crown on the appeal to-day agrees that it is impossible to justify that course.

Secondly, and this is more serious, there was no corroboration of the story of the prosecutrix. If the Commissioner, in summing up, had given to the jury a warning that in the absence of such corroboration it was unsafe to convict the appellant, and the jury notwithstanding, being convinced of the truthfulness of the prosecutrix, had convicted him, that conviction would no doubt have been unassailable. That view has been taken by this Court in many cases, but in all of them the fact that there was no

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JAMES PHILLIPS.

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corroboration was brought to the attention of the jury. In this case the warning relating to the importance of corroboration was undoubtedly given, but the effect of that warning was more than taken away by the Commissioner's enumerating matters as corroboration which were not corroboration. In these circumstances it is not possible for the Court to say that, with a proper direction, the jury must have come to the same conclusion, and this appeal must be allowed.

Conviction quashed.

G. B.

THOMAS TOWNSEND.
HENRY HILDER.

Persons arrested together need not be tried together, and if any one of them is likely to be embarrassed in his defence, ought not to be so tried.

Appeals against conviction and sentence.

The appellant, Townsend, was convicted on July 24th, before the Deputy Chairman, at the County of London Sessions, of housebreaking and of possessing housebreaking implements by night, and was sentenced to three years' penal servitude. The appellant, Hilder, was convicted on the same occasion of possessing housebreaking implements by night, and was sentenced to four years' penal servitude.

Arthur Bryan for the appellant, Townsend (under s. 10 of the Criminal Appeal Act, 1907), who was present. Townsend was tried on an indictment which charged him, in the first count, with breaking and entering a dwelling-house and stealing therein certain property; in the second count, with receiving the property; and, in the third count, together with the appellant, Hilder, with being found in possession of housebreaking implements by night. The joinder of these counts in the same indictment, and both appellants being tried on them all at the same time, led to confusion, which prejudiced the appellant's position. [He was stopped.]

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20 *August.*

THOMAS TOWNSEND.
HENRY HILDER.

Hewart L.C.J.
Swift J.
Branson J.

Hilder in person.

Vernon Gattie for the Crown assented to Townsend's conviction being altered to one of knowingly receiving stolen property, and agreed that there was no evidence against Hilder.

The LORD CHIEF JUSTICE: At 7.30 p.m. on July 9th a police officer saw the appellants and a third man standing and talking near a public-house. The officer was joined by another officer. The three men crossed the road. As the first officer approached them Townsend stumbled, and a jemmy fell from his pocket. The third man ran away, but the appellants were taken to the police station. Townsend was found to have in his possession jewellery stolen from a house which had been broken into between 6.15 and 9.30 on the same night. In Hilder's possession no part of the stolen property was found.

Unfortunately the two appellants were tried together, and that mode of trial led to grave embarrassment. In the opinion of the Court, there was no evidence at all against Hilder, and therefore his appeal is allowed. Townsend could not have escaped a conviction of receiving stolen goods, and that conviction being substituted for that already on the record, his sentence will be reduced to one of twelve months' hard labour.

Sentence reduced.

Conviction quashed.

G. B.

ADDENDUM TO *NORMAN'S CASE.*

After the judgment had been given in *R.* v. *Norman,* 18 Cr. App. R. 81, fifty-six prisoners who were undergoing sentences of preventive detention petitioned the Secretary of State for the exercise of His Majesty's mercy, each alleging that his case was within the decision of *R.* v. *Norman,* and that his sentence of preventive detention ought to be remitted.

The Secretary of State referred the point raised in each of these petitions to the Court of Criminal Appeal under s. 19 (b) of the Criminal Appeal Act, 1907, and asked the Court for their opinion whether any action should be taken in any of the cases so referred.

The Court, in accordance with the provisions of Criminal Appeal Rule 51, and the practice of the Court in such references, considered all the cases in private, and then advised the Secretary of State that the term of preventive detention should be remitted in seven of the cases so referred to them. The principle upon which the Court acted was to advise remission in every case in which it was not clear that the petitioner must inevitably have been found to be a habitual criminal under the law as laid down in the judgment of *R.* v. *Norman.*

BEFORE

The LORD CHIEF JUSTICE, Mr. JUSTICE AVORY and Mr. JUSTICE SALTER.

1924
20 *October.*

WILLIAM JOHN KILLICK.

On a charge of indecent assault, when the corroboration of the prosecutrix is very slight, the desirability of effective corroboration should be made clear to the jury.

Appeal against conviction and sentence.

The appellant was convicted on August 6th, 1924, before the Acting Deputy-Chairman, at the County of London Sessions, of indecently assaulting a girl under sixteen, and was sentenced to twelve months' imprisonment in the second division.

During the hearing of the case before the magistrate he received a letter purporting to be signed by defendant and to be a confession of guilt: the latter denied all knowledge of it, and it was used in his favour at the trial to show that there was *animus* against him.

Albert Crew, for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The Acting Deputy-Chairman did not sufficiently warn the jury against the danger of their convicting the appellant without adequate corroboration of the evidence of the girl. *Rudge,* 17 Cr. App. R. 114: 1923: c.q.; *W. G. Berry,* 18 Cr. App. R. 65: 1924: c. q. All he said was: "Corroboration is not necessary in a case of this kind, but juries always like to find it, and it is desirable to have corroboration."

McClure for the Crown. There was corroboration of the girl's evidence.

The Lord Chief Justice: It cannot be said that there was no corroboration in this case, but, as was said in the summing up, it was amazingly slight. This was essentially a case in which a clear and emphatic warning ought to have been given to the

jury. In cases of this sort it is always necessary to warn the jury of the importance of corroboration, which, though not essential in law, is always required in practice, and here it was especially necessary because of the *animus* shown against appellant. The appeal must be allowed.

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20 *October.*

WILLIAM JOHN KILLICK.

Hewart L.C.J.

Conviction quashed.

G. B.

ISRAEL JAMES HUSSEY.

Venire de novo *awarded in the case of a defendant whose plea (of guilty) had possibly been misunderstood.*
W. Baker, 7 *Crim. App. R.* 217: 1912, *followed.*

Appeal against conviction and sentence.

The appellant was convicted on September 15th, 1924, before Shearman, J., at the Central Criminal Court, of unlawful wounding, and was sentenced to twelve months' imprisonment.

Ronald Powell, for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The appellant at first pleaded "not guilty" to the indictment, which charged him with wounding two persons with intent to do them grievous bodily harm. After the case for the prosecution had been opened, however, he had an interview with his counsel, who, on the resumption of the case, told the Court that the appellant would withdraw his plea of not guilty and would plead guilty to the charge of unlawful wounding. The Clerk of Arraigns put the charge to the appellant, who replied: "I plead guilty in self-defence." He was then treated as having pleaded "guilty," and sentence was passed on him. It is submitted that the appellant did not intend to plead guilty and did not do so, and that the proceedings were null and void. Application is made for a *venire de novo* or an order similar to that made in *W. Baker,* 7 Cr. App. R. 217: 1912.

Fulton for the Crown. If there is any doubt that this man intended to plead guilty, I have nothing to say.

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ISRAEL JAMES HUSSEY.

Hewart L.C.J.

The LORD CHIEF JUSTICE: The appellant was indicted for wounding a man and a woman with intent to do them grievous bodily harm. It was evidently believed by those in Court that he pleaded "guilty" to the minor charge of unlawful wounding. It is tolerably clear from the shorthand note that only part of what he said was heard. It may well be that he dropped his voice or that, for some other reason that will easily be understood by those who know this particular Court, his last three words were not heard. It appears certain that the judge proceeded to sentence the appellant under the belief that he had pleaded guilty without qualification. In these circumstances the proper order is that which was made in *Baker,* namely, that the conviction of appellant be set aside and he be ordered to appear at the next session of the Central Crminal Court and to plead to the indictment.

On the application of *Powell,* appellant, who was a man of good character and had previously been granted bail, was granted the same bail pending his appearance at the Central Criminal Court.

Venire de novo *awarded.*

G. B.

GEORGE VAREY.

Conviction quashed by reason of irregularities at the trial.

Appeal against conviction and sentence.

The appellant was convicted before the Acting Deputy-Chairman, on August 19th, 1924, at the County of London Sessions, of common assault, and was sentenced to six months' imprisonment with hard labour.

Ronald Powell, for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was convicted, with a man named Pratt, of an assault on a man named Goldberg on June 9th, 1924, at Pentonville. The defence of appellant was an *alibi.* The trial was unsatisfactory. The jury were not properly directed, and their attention was not drawn to matters

connected with the identification of appellant, who was not defended by counsel. [He was stopped.]

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GEORGE VAREY.

Hewart L.C.J.
Avory J.
Salter J.

Hawtin for the Crown. The question was entirely one for the jury, who did not believe the *alibi* put forward by appellant. Moreover, there was evidence of identification by witnesses for the Crown on which the jury could properly convict. Counsel read that evidence.

The LORD CHIEF JUSTICE: It has been contended on behalf of the Crown that this trial was satisfactory. It may have been satisfactory except in the following respects, among others: (a) Questions were asked which ought not to have been asked; (b) leading questions were put on crucial points; (c) although appellant was undefended, he was not told what his rights were; (d) he was given no assistance in developing his defence; (e) there was little, if any, evidence against appellant to go to the jury, and the summing up assumed findings against him. The trial, in fact, was so unsatisfactory that this appeal must be allowed.

Conviction quashed.

G. B.

CHARLES FRANCIS EVANS.

24 *October.*

Early complaint by the prosecutrix in sexual cases is not corroboration.

Application for extension of time for leave to appeal against conviction and sentence. This having been granted, without reason stated, the Court dealt with the matter as with a final appeal.

The applicant was convicted on July 5th, 1924, before Mr. Commissioner Parfitt, K.C., at Stafford Assizes, of having had unlawful carnal knowledge of a girl under thirteen, and was sentenced to three years' penal servitude.

Frank Vachell, for the applicant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The charge against applicant was in respect of a girl aged eight years and a half, who

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24 *October.*

CHARLES FRANCIS EVANS.

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gave unsworn testimony under s. 30 of the Children Act, 1908. Proviso (a) of the section provides that "a person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused." Here there was no such corroboration [He was stopped.]

T. P. Haslam for the Crown. The girl complained to an older girl just after the alleged offence, and the older girl's evidence was corroboration of the credibility and the consistency of the younger, although not of the truth, of the latter's evidence. The evidence of the doctors was strong corroboration of recent violence: it is impossible in this class of case to get stronger. *Osborne*, 1905, 1 K. B. 551; 74 L. J. K. B. 311; 69 J. P. 189; 21 T. L. R. 288; 92 L. T. 393; C. C. R.; *I. Rogers*, 24 Cox, C. C. 465; 111 L. T. 1115; 79 J. P. 16; 10 Cr. App. R. 276: 1914: c. q.

The LORD CHIEF JUSTICE: It has been pointed out again and again in these cases that evidence of a complaint by the prosecutrix is not corroboration of her evidence against the prisoner. It entirely lacks the essential quality of coming from an independent quarter. In *Baskerville*, 1916, 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 25 Cox, C. C. 524; 60 S. J. 696; 12 Cr. App. R. 81, where all the authorities were considered by this Court, Lord Reading, C.J., said: "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it." Here the evidence which is mentioned as being possible corroboration was not independent, but proceeded circuitously from the prosecutrix. This appeal must, therefore, be allowed.

Conviction quashed.

G. B.

WALTER JOHN GARNER.

1924
24 *October.*

Hewart L.C.J.
Avory J.
Salter J.

Sentence for wounding with intent to murder reduced in view of serious provocation.

Appeal against sentence by leave of the Court.

The appellant was convicted on September 15th, 1924, before Shearman, J., at the Central Criminal Court, of wounding his wife with intent to murder her, and was sentenced to three years' penal servitude.

No counsel appeared.

AVORY, J.: At the trial the judge rather emphasised to the jury the principle that every man is taken to intend the natural consequences of his acts, and he said that if a man uses a razor to a woman's throat, he must be assumed to intend to kill her. The jury, impressed, no doubt, by that argument, found the appellant guilty. There are, however, circumstances in the case which might have led them to take a more lenient view. The appellant served in the army for some years, and, on returning from service abroad, he found his wife living the life of a prostitute. He made repeated efforts to induce her to give up that life, but she refused to do so. In a moment of great irritation produced by these refusals, he wounded her with his razor. Having regard to all the circumstances of the case, the great irritation under which the appellant was labouring and the nature of the wounds which were inflicted on the woman, the Court considers that a sentence of twelve months' imprisonment with hard labour should be substituted for that which was passed.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SALTER.

1924
27 *October.*

JAMES FITTON.

Sentence reduced in view of periods of honest life.

Application for leave to appeal against sentence.

The applicant was convicted on October 3rd, 1924, before the Recorder at Bradford City Sessions of warehouse-breaking, and was sentenced to eighteen months' imprisonment with hard labour.

The applicant was not present, and neither he nor the Crown were represented.

SHEARMAN J.: This is a case in which the Court would grant leave to appeal, but as the applicant is not represented, and as the Assistant-Director of Public Prosecutions, who is present in Court, raises no objection, the Court, to save time and expense, will deal with the matter at once. The Court is loath to interfere with the discretion of the judge at the trial, but, although the applicant had had several previous convictions, there were long periods of honest life between them; the property stolen in this case was trumpery, and no alarm was caused to neighbouring residents. In the circumstances the Court thinks that the sentence should be reduced to one of nine months' imprisonment with hard labour.

Sentence reduced.

G. B.

SIDNEY JOSEPH BAXTER.

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27 *October.*

Hewart L.C.J.
Shearman J.
Salter J.

On the allegation of being a habitual criminal, evidence that the prisoner is an associate of thieves cannot be given unless the statutory notice has included a reference to such evidence.

Appeal against sentence and application for leave to appeal against conviction as a habitual criminal.

Appellant pleaded guilty on September 30th, 1924, before the Common Serjeant at the Central Criminal Court of housebreaking (*a*), and was sentenced to three years' penal servitude. He was also found to be a habitual criminal, and was sentenced to five years' preventive detention.

Highmore King for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Evidence was given at the trial that the appellant had associated with thieves, but no mention of that evidence was included in the statutory notice which had been served on the appellant. If it is desired to give evidence of association with thieves it must be stated as a ground in the notice. *Wilkins, Harris and others*, 1922, 2 K. B. 543; 91 L. J. K. B. 587; 126 L. T. 639; 86 J. P. 105; 38 T. L. R. 343; 16 Cr. App. R. 96: c. q.

[He was stopped.]

Arthur Bryan for the Crown. The questions which produced from a police witness the evidence complained of were put from the Bench in the desire to help the prisoner. What took place cannot be defended.

The Lord Chief Justice: It is evident that the Common Serjeant took great pains to elicit everything that could be elicited on behalf of the appellant. Unfortunately in doing so he asked a police witness the general question: "Do you know anything more about him?" The officer said that the appellant had been associating with convicted thieves. No doubt, if the Director of Public Prosecutions had been minded to include among the grounds in the statutory notice to the appellant, under s. 10, sub-s. 4, of the Prevention of Crime Act, 1908, the allegation that after a certain date he had associated with convicted persons, that would have been a proper and relevant allegation, but

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it has been laid down in this Court in the clearest terms that if matters of that kind are to be relied on and given in evidence, it is necessary that the man in the dock should have clear notice of them. In *Wilkins, Harris and others* (above), Lord Trevethin C.J., said: "Care should be taken during the trial that evidence is not given against the offender unless due notice of the facts has been already given to him. Counsel for the prosecution should especially be careful to observe the grounds alleged in the notice of the Director of Public Prosecutions, and to see that his witnesses do not run on and give evidence of facts not set out in such notice. A general question to a police officer, 'What do you know about the prisoner?' may let in evidence of facts not so set out, and lead to the quashing of the conviction." (16 Cr. App. R. 98.) And again, a little lower down: "If it is intended to prove that the offender has been associating with thieves, that fact must have been set out in the notice," and a line of authority is quoted in support of the proposition. When the jury came to consider their verdict in this case, part of the material on which their minds must operate was material which ought to have been excluded, as it was not included in the notice. It is therefore not possible for this Court to take any other course than to quash the conviction of the appellant as a habitual criminal.

Conviction as habitual criminal quashed.

G. B.

JAMES ST. ALBAN PAUL.

After a conviction as a habitual criminal, it is an independent question for the court of trial whether there should be a sentence of preventive detention.

Appeal against sentence and application for leave to appeal against conviction as a habitual criminal.

The appellant pleaded guilty on September 30th, 1924, before the Common Serjeant at the Central Criminal Court of housebreaking, and was sentenced to three years' penal servitude. He

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JAMES ST. ALBAN PAUL.

Hewart L.C.J.
Shearman J.
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was also found to be a habitual criminal, and was sentenced to five years' preventive detention.

Appellant in person. I was released from serving my last previous sentence on December 6th, 1923. On August 4th, 1924, I committed the housebreaking, for which I was sentenced to three years' penal servitude on October 1st. Between December 6th and August 4th I lived a perfectly honest life. After my release I endeavoured to get an honest living, and after two months' hard trying I succeeded. I was in that situation for six months—till the day of my arrest. On this day, which was Bank Holiday, I met Baxter (*a*); we had some drink, and without premeditation by either of us, we committed the housebreaking.

Arthur Bryan for the Crown. It cannot be suggested that a man is not persistently leading a dishonest or criminal life if, when he has a pension and is earning good wages for six months and is in no want, he deliberately reverts to crime, which he has avoided for eight months, and steals goods to the value of 300*l*. It was a question for the jury whether the appellant was leading a life of crime.

A written statement by appellant, which the learned judge had declined to read, was handed to the Court.

The LORD CHIEF JUSTICE: In this case the question was left to the jury whether or not the appellant was a habitual criminal. It was essentially a question for the jury, and notwithstanding the interval from December 6th, 1923, to August 4th, 1924, it is not possible to say that there was not evidence on which the jury could properly find that the appellant then was a habitual criminal. But that did not conclude the matter. It cannot too often be remembered that the Prevention of Crime Act, 1908, is very careful to distinguish between the duties which have to be performed by the jury and those which have to be performed by the Court. S. 10, sub-s. 1, provides that "where a person is convicted on indictment of a crime committed after the passing of this Act, and subsequently the offender admits that he is, or is found by the jury to be, a habitual criminal, and the Court

(*a*) See p. 127.

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James St. Alban Paul.

Hewart L.C.J.

passes a sentence of penal servitude, the Court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence" of preventive detention "as the Court may determine." In other words, three distinct steps are necessary before a man may properly be sentenced to preventive detention. First, he must admit that he is, or must be found to be, a habitual criminal. Secondly, the Court must take such a view of the substantive offence with which he is charged as to think it right because of that offence itself, and for no other reason, to pass a sentence of penal servitude in respect of it. Thirdly, the Court must be of opinion that by reason of the criminal habits and mode of life of the prisoner it is expedient for the protection of the public that he should be kept in preventive detention.

Here the jury found the appellant to be a habitual criminal. The court passed a sentence of penal servitude in respect of the substantive offence, which it is not suggested is too severe. Then came the profoundly important question whether the court was of opinion that the appellant should be sentenced to preventive detention. It appears that as soon as the jury returned to court and found the appellant to be a habitual criminal, the Common Serjeant said that he could hear nothing more, but *must* deal with the appellant as being a habitual criminal, and he declined to read a paper handed in by the appellant which we have read to-day. As unfortunately has happened elsewhere, the Common Serjeant appears to have thought that a sentence of preventive detention followed *as of course* upon the finding that the appellant was a habitual criminal, and the exclusion of the written statement suggests the like conclusion. After a man has been found to be a habitual criminal, it becomes a separate and independent matter for the court whether he should be sentenced to preventive detention. That independent discretion does not appear to have been exercised in the present case, and while the conviction of the appellant will stand, this appeal, so far as the sentence of preventive detention is concerned, must be allowed.

Sentence of preventive detention quashed.

G. B.

FREDERICK MASON.

1924
3 *November.*

Hewart L.C.J.
Shearman J.
Salter J.

Misdirection.

While a judge is entitled to express his view of any evidence, he ought not to "invite" the jury to make a definite finding: any expression of his own views ought to be accompanied by a direction that the right of deciding on the facts is solely theirs.

Appeal against conviction.

The appellant was convicted on September 27th, 1924, before the Chairman at Middlesex Sessions, of knowingly receiving stolen goods, and was sentenced to four months' imprisonment in the second division.

Frank Powell, for the appellant, who was present. The appellant was charged with stealing and receiving gramophone sound-boxes and records. There were a number of irregularities at the trial. Evidence for the prosecution was wrongly admitted; the Chairman wrongly refused to withdraw the case from the jury at the close of the case for the prosecution; and there was misdirection and non-direction of the jury on the law and the facts. In particular, the Chairman gave the jury no warning regarding the value, if any, to be attached to the evidence of an accomplice; the fact of the stealing of the goods was assumed against the appellant; and the jury were actually "invited" to accept the evidence of the police and to convict the appellant on it. The result was a miscarriage of justice.

Travers Humphreys for the Crown. It was not a model summing up, but there was no misdirection, and the Chairman told the jury everything necessary to leave the issues to them. When the defence has been conducted by counsel, the judge need not sum up a case to the jury meticulously: per Darling J., in *Immer*, 1917, 13 Cr. App. R. at p. 24; 118 L. T. 416; 26 Cox C. C. 186: 1917. H also referred to *Finch*, 1916, 85 L. J. K. B. 1575; 115 L. T. 458; 12 Cr. App. R. 77: 1916: c. q.

The Lord Chief Justice: The indictment on which the appellant was found guilty charged him and another man with stealing and receiving a quantity of gramophone sound-boxes

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3 *November.*

FREDERICK MASON.

Hewart L.C.J.

and records. The only evidence against the appellant was that of his fellow-prisoner and of a statement which he was said to have made after his arrest. His counsel has mentioned several grounds of appeal. It is enough to deal with one only. In the opinion of the Court the summing up was not satisfactory. It was of vital importance that it should be made plain to the jury (a) that the evidence of the appellant's fellow-prisoner, being the evidence of an accomplice, needed corroboration, and (b) that the jury should have been left in no doubt that they were to decide whether the evidence for the prosecution was to be accepted or not. No doubt, it is proper for a judge, in dealing with evidence, to express, sometimes strongly, the view that the facts ought to be dealt with in a particular way, or that certain evidence ought not to be accepted, but when the judge does so express his own personal views, that expression should be accompanied by a clear and unequivocal warning that it is the function and the responsibility of the jury to decide whether the evidence is to be accepted or not. Cases have been cited, which make it quite plain that in so doing the judge would not exceed his powers, but that is a different thing from saying, on a crucial part of the case: "I invite you to take such and such a course." The idea of "inviting" a jury is suited rather to an advocate than to a judge. In the present case there is reason to apprehend that with regard to both the acceptance of certain evidence and the finding in that evidence of corroboration of other evidence the jury may not have been left sufficiently clearly in the belief that the responsibility was theirs. In these circumstances, as it is not clear that with a proper direction the jury must inevitably have arrived at the same conclusion, we think that this conviction is unsatisfactory and that this appeal should be allowed.

Conviction quashed.

Solicitors for Appellant—*Gardner and Smith*, Uxbridge.
Solicitors for Respondents—*Pierron and Morley*.

G. B.

FREDERICK DEAN.

1924
3 *November.*

Hewart L.C.J.
Shearman J.
Salter J.

This Court will not review a summary conviction of an incorrigible rogue, but it will insist that Quarter Sessions, for the purpose of sentence, shall hear nothing but legal evidence.

Appeal against sentence.

Appellant was convicted on July 29th 1924, at the Birmingham Petty Sessions, of loitering with intent to commit a felony. He was deemed to be an incorrigible rogue, and was committed to the Birmingham City Sessions for sentence. On September 24th the Recorder sentenced him to nine months' imprisonment with hard labour.

G. E. Wakefield, for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant should not have been deemed to be an incorrigible rogue, because there was no proper proof before the justices of his previously having been convicted *as* a rogue and vagabond. The certified conviction was for "loitering with intent." The Court held that this was sufficient proof of conviction as a rogue and vagabond under ss. 4, 5 of the Vagrancy Act, 1824, as amended by s. 7 of the Penal Servitude Act, 1891. But, in any case, the Court will look into the facts on which the appellant was last convicted, and if, as it is submitted is the case, the Court finds that there was no evidence to support the conviction, the Court will substitute a nominal sentence for that which was passed.

There is no appeal to this Court against a conviction as an incorrigible rogue: *W. J. Brown,* 1 Cr. App. R. 85; 72 J. P. 427: 1908; but the Court in a proper case will review the sentence. *W. Johnson,* 1909, 1 K. B. 439; 78 L. J. K. B. 290; 73 J. P. 135; 100 L. T. 464; 25 T. L. R. 229; 2 Cr. App. R. 13; and in *T. M. Mackenzie,* 18 Cr. App. R. 113: 1924.

H. R. D. May for the Crown. In considering whether or not the sentence of Quarter Sessions should be reviewed, this Court cannot regard material other than that which was before Quarter Sessions. In this case the Quarter Sessions had sufficient material before it properly to exercise its powers. He referred

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FREDERICK DEAN.

Hewart L.C.J.

to *Thomas Evans*, 1915, 2 K. B. 762; 84 L. J. K. B. 1603; 113 L. T. 508; 79 J. P. 415; 59 S. J. 496; 31 T. L. R. 410; 11 Cr. App. R. 178: sentence q.

The LORD CHIEF JUSTICE: Counsel has urged that there ought not to have been a conviction here, as the requirements of the law were not satisfied. In the opinion of the Court that point fails, but the matter does not stop there. In dealing with the question of sentence, this Court must look into the facts of the case to see what the proper sentence is, just as the Court of Quarter Sessions must do so. [His Lordship reviewed the facts and continued.] When the Court of Quarter Sessions approached the task of sentencing the appellant, a police officer said that he was afraid that the appellant had developed into a bad criminal, and that he had been getting his living by housebreaking. If that is so, he has been singularly lucky in not being convicted or even charged. It looks very much as if it was thought that there was not enough evidence to charge the appellant with attempted housebreaking, and this other method was adopted. It would be in the highest degree unfortunate if in any part of the country those who are responsible for setting in motion the criminal law should entertain, connive at or coquette with the idea that in a case where there is not enough evidence to charge the prisoner with an attempt to commit a crime, the prosecution may, nevertheless, on such insufficient evidence, succeed in obtaining and upholding a conviction under the Vagrancy Act, 1824. Having regard to all the facts of this case—this Court is only concerned with the sentence—the Court is of opinion that the sentence which has been passed on the appellant may suitably be reduced to one day's imprisonment.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SALTER.

WILLIAM JONES.
RICHARD POOLE.
FRED TERRY.

1924
10 *November.*

Severity of sentence.

Appeals against sentence.

The appellants were convicted on October 4th, 1924, before the Recorder at Bradford City Sessions of larceny and receiving, and were each sentenced to eighteen months' imprisonment with hard labour.

Appellants, who appeared in person, added nothing to written statements which they had placed before the Court.

The LORD CHIEF JUSTICE: The appellants were convicted on an indictment charging them with stealing and receiving a quantity of cloth from a warehouse at Bradford. How the cloth was taken away from the warehouse does not appear, but the appellants were proved to have been dealing with some of it shortly after it was shown to be missing. Apparently there were two receivers who were not before the Court of Quarter Sessions. Clearly a serious offence was committed. These three appellants are aged 38, 37 and 29 years. Poole and Terry were bound over on conviction of an offence, the one twenty years ago, and the other three years ago. Jones had never been convicted before. Having regard to the facts of the case, and the records and the ages of the appellants, the Court is of opinion that their sentences may properly be reduced to nine months' imprisonment with hard labour in each case.

Sentences reduced.

G. B.

1924
10 *November.*

Hewart L.C.J.
Shearman J.
Salter J.

ERNEST BRIERLEY.

On an indictment charging breaking and entering, a breaking in law must be proved, and the jury must be distinctly charged on this point.

Appeal against conviction and sentence.

Appellant was convicted on October 20th, 1924, before the Chairman at Lancashire Sessions (Salford Hundred) of shop-breaking, and was sentenced to three months' imprisonment with hard labour.

J. M. Helme for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was found by a man named Hodges at 6.30 on a Sunday morning in a shop at Royton which had been broken into. Hodges told him that he had better "get out," or he would be getting into trouble. Appellant left the shop and Hodges informed the police, who arrested appellant. Nothing had been stolen from the shop. Appellant said that he had found the shop open, and had gone into it to buy food. The summing-up was in such a form as probably to lead the jury to suppose that if appellant's story were accepted he could be found guilty on the indictment on which he was charged if it were found that he had an intention to steal when he entered the shop. Appellant was charged under s. 27, sub-s. 2, of the Larceny Act, 1916; breaking and entering is an essential ingredient of an offence under that section.

J. C. Jolly for the Crown. It was a question of fact for the jury whether appellant had broken and entered the shop with intent to steal, and there was evidence to go to the jury that he had. He was found on the premises when he could not think that they were open for business, and when challenged by Hodges, he did not tell the same story as that which he told to the police and, later, to the jury. The summing-up was adequate, and directed the jury to consider whether there was a breaking and entering.

[Shearman J.: The only case where you can have a breaking and entering without actual physical breaking of something is where entry is made by descent of a chimney, because a chimney is deemed to be closed.]

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10 *November.*

ERNEST BRIERLEY.

Hewart L.C.J.

The LORD CHIEF JUSTICE: No doubt there was some evidence on which the jury might have found that appellant had broken and entered the shop with intent to steal. Unfortunately the Chairman, who protected the interests of appellant in every possible way, and summed up very carefully to a certain point, finally used phrases, especially in answer to questions put by a juryman, which may well have had the effect of conveying to the jury the impression that if they were satisfied that appellant was in the shop to steal, it mattered not whether he was the person who had broken into the shop. That seems to us to be the unfortunate consequence of answering, perhaps a little hastily, questions which at the last moment were volunteered by members of the jury. It is not clear that the jury in this case directed their minds to the fundamental question whether appellant broke and entered the shop with intent to steal, and the conviction of the appellant is therefore unsatisfactory, and must be quashed.

Conviction quashed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE ACTON.

HENRY FRANK DURAND.

17 *November.*

Severity of sentence.
Remarks on sentences on old offenders.

Appeal against sentence.

Appellant was convicted on October 14th, 1924, before the Chairman at Hertfordshire (St. Albans) Sessions of obtaining money by false pretences, and was sentenced to three years' penal servitude.

Appellant, in person, added nothing to the written statement which he had submitted to the Court.

The Crown was not represented.

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17 *November*.

HENRY FRANK DURAND.

Hewart L.C.J.

The LORD CHIEF JUSTICE: The appellant obtained various small sums of money from a tobacconist by falsely representing that he had obtained certain appointments. He has a bad record both in South Africa and in this country. In considering whether a sentence in such a case as this is proper, one has to beware of treating an offence as serious in itself because it has been committed by a man who previously has committed a series of offences. The hall-mark of appellant's present crime is meanness and treachery; the amount of money which he obtained was comparatively trivial. On the whole the Court is of opinion that the sentence should be reduced to eighteen months' imprisonment with hard labour.

Sentence reduced.

G. B.

THOMAS PRICE.

See last headnote.

Appeal against sentence.

Appellant was convicted on October 17th, 1924, before the Chairman at Lincolnshire (Parts of Lindsey) Sessions of office-breaking, and was sentenced to three years' penal servitude.

Appellant, in person, added nothing to the written statement which he had submitted to the Court.

The Crown was not represented.

The LORD CHIEF JUSTICE: The appellant has a bad record, but the fact that he has committed some serious offences is no reason for giving him a sentence of penal servitude for an offence of the kind disclosed in this case, namely, breaking into a railway station booking-office and stealing some cigarettes and some bottles of horse medicine. In the opinion of the Court the sentence ought to be reduced to twelve months' imprisonment with hard labour.

Sentence reduced.

G. B.

WILLIAM WINTER.

1924
17 *November.*

Hewart
L.C.J.
Shearman J.
Acton J.

Sentence mitigated in view of a long period of honest work.

Appeal against sentence.

Appellant was convicted on October 16th, 1924, before the Chairman at Northumberland Sessions of shopbreaking, and was sentenced to three years' penal servitude.

Appellant, in person, added nothing to the written statement which he had submitted to the Court.

The Crown was not represented.

The Lord Chief Justice: The record of appellant, who is 42 years of age, was bad from 1895 to 1914. After 1914, however, he appears to have made a real effort to live honestly, and he is described as being an excellent worker. He was thrown out of work in consequence of matters which were not under his control, and unfortunately he drifted back into crime. In view of all the circumstances, and not least of the honest life which he led for a time, the Court thinks that his sentence may properly be reduced to twelve months' imprisonment with hard labour.

Sentence reduced.

G. B.

HENRY WILLIAM ALEXANDER.

The jury must be warned against the acceptance of a mere suggestion by the Crown in cross-examination unsupported by evidence on a material point.

Appeal against conviction and sentence.

Appellant was convicted on October 16th, 1924, before the Chairman at the West Kent Sessions of larceny, and was sentenced to twelve months' imprisonment with hard labour.

Gerald Howard for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. There was no evidence on

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HENRY WILLIAM ALEXANDER.

Hewart L.C.J.
Shearman J.
Acton J.

which appellant could satisfactorily be convicted of the stealing or receiving of the motor bicycle with which he was charged.

No counsel appeared for the Crown.

The LORD CHIEF JUSTICE: The charge against the appellant was stealing and receiving a motor cycle in November, 1920. He then bought a cycle and sold it again, showing the purchaser the receipt for the price which he had given for the machine, and giving the purchaser a receipt for what he paid. The cycle passed from hand to hand, and was eventually identified as the stolen cycle. Appellant stated that he bought it from the mate of the barge *Atalanta*. The prosecution adduced no evidence with regard to the *Atalanta*, but appellant was asked in cross-examination whether he knew that the *Atalanta* had sunk on August 28th, 1919, with all hands. He said that he knew nothing about it. There was not a scrap of evidence before the jury of the date of the sinking of the *Atalanta*, and it is clear that this conviction cannot stand.

Conviction quashed.

G. B.

ALLEN THOMAS EDWARDS.

Where an indictment charges two persons with certain offences "with one another," if one is acquitted the other may sometimes but not always be convicted.

Appeal against conviction.

Appellant was convicted on October 21st, 1924, before the Recorder at the Central Criminal Court of gross indecency with a male person, sentence on him being postponed pending this appeal.

Keeves for appellant, who was present, was not called on to argue.

E. Duke, for the Crown, said that he was present to support the conviction, but that if the Court was of opinion that it should not stand, he would not press the matter.

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ALLEN
THOMAS
EDWARDS.

Hewart
L.C.J.

The LORD CHIEF JUSTICE: The Court is of that opinion. It is not necessary to enter into the details of this disgusting case. The indictment, which contained one count, charged the men with having committed gross indecency "with one another." The other man was acquitted. Without laying down any general principle that on an indictment of this kind one defendant cannot be convicted if the other is acquitted, on the evidence in this case and on the way in which the case was put to the jury, it is, in our opinion, impossible to uphold a conviction of one defendant side by side with the acquittal of the other.

Conviction quashed.

Solicitor for the Appellant—*Shaw & Son.*

G. B.

HENRY ROSS.

When an indictment alleges specific offences on distinct dates the jury should be warned to deal with each occasion separately, and not to permit inadequate evidence in the one to supplement inadequate evidence in the other.

Appeal against conviction.

Appellant was convicted on October 28th, 1924, before Mr. Commissioner Hollis Walker, K.C., at Lincolnshire Assizes of carnal knowledge of a girl under sixteen, and was sentenced to twelve months' imprisonment with hard labour.

Maurice Healy for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The conviction should be quashed on the ground that there was a great deal of confusion in the minds of the jury with regard to the corroboration of the girl's evidence. The Commissioner indicated as corroboration evidence which did not constitute corroboration.

No counsel appeared for the Crown.

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HENRY ROSS.
Hewart L.C.J.

The LORD CHIEF JUSTICE: In a case of this kind corroboration of the story of the prosecutrix, though not essential in law, is required in practice. It is the well-settled practice to warn juries that it is not safe to convict on the uncorroborated testimony of the prosecutrix. To tell the jury that something is corroboration which is not corroboration may have a more unfortunate result than the omission of any warning on the matter. The corroboration required is such corroboration of the story of the prosecutrix as tends to prove that the defendant has committed the offence charged against him. See *Baskerville*, 1916, 2 K. B. 658; 86 L. J. K. B. 28; 25 Cox, C. C. 524; 12 Cr. App. R. 81. Here matter was treated as corroboration which was not corroboration. Moreover, as charges were made against the appellant with regard to two dates, the jury should have been warned that they should consider the evidence referring to one date separately from that referring to the other and not yield to the temptation, if they thought that the evidence was insufficient with regard to either date alone, to supplement it by evidence about the other date, and to find the evidence as a whole sufficient to convict appellant. That warning was not given. It is true that an answer given by the defendant when he was charged might conceivably have supplied such an admission as to afford the requisite corroboration. But it is impossible to say that the jury found the corroboration in the only quarter in which they could properly find it, and were not led away to think that something else was corroboration which was not corroboration. The conviction must be quashed.

Conviction quashed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SALTER.

OLIVER TAYLOR.

1924
1 *December.*

Severity of sentence after many previous convictions.

Appeal against sentence.

Appellant was convicted on October 16th, 1924, before the Chairman at North Riding Sessions of larceny, and was sentenced to three years' penal servitude.

Appellant in person.

The Crown was not represented.

THE LORD CHIEF JUSTICE: The appellant pleaded guilty to the charge of stealing a woman's coat from a lobby leading to the office where she was employed. He is thirty-five years old, and he had previously been convicted on twenty occasions. The last sentence he served was one of eighteen months' imprisonment, from which he was released in October, 1923. He was out of prison for nine months before the commission of the present crime. It has been said over and over again in this Court that the mere fact that a man has been convicted many times is not in itself sufficient reason for passing a heavy sentence on him for an offence which is trivial in itself. The Court is satisfied that the proper sentence here is one of twelve months' imprisonment with hard labour.

Sentence reduced.

G. B.

1924
1 *December.*

GEORGE RICHARDS.

Hewart L.C.J.
Shearman J.
Salter J.

Evidence improperly admitted at the trial may be a ground for quashing a conviction.

On an indictment charging housebreaking, and knowingly receiving stolen property, if the latter count was not effective, the Court, when quashing the conviction in the former, will not substitute a verdict for receiving, as appellant was not, in fact, called upon to explain his possession.

Appeal against conviction and sentence.

Appellant was convicted on October 15th, 1924, before the Chairman at Cheshire (Chester) Sessions of shopbreaking, and was sentenced to five years' penal servitude.

F. B. Reece for the appellant (under sect. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was convicted on an indictment charging him with breaking into a kiosk on a railway station, and stealing thence a quantity of cigarettes and cigars, and also with receiving the cigarettes and cigars knowing them to have been stolen. A young man named Lever was charged with appellant and pleaded guilty. Appellant called him as a witness for the defence. Lever was asked in cross-examination whether he had not made a statement to a woman named Mummery to an effect which was contrary to that of his evidence. Lever denied that he had made the statement, and afterwards Mummery was called by the prosecution, and she said that some time previously Lever had told her that he and another man and appellant had broken into the kiosk. Mummery's evidence was used as affirmative evidence to prove appellant's guilt. That was improper, and the conviction cannot stand.

[He was stopped.]

Ronald Powell for the Crown. The evidence of Mummery was admissible in rebuttal of the evidence of Lever, and it was used in that way and not as substantive evidence of appellant's guilt. Alternatively, there was evidence on which appellant could properly be found guilty of receiving the property, and the Court can either confirm the formal conviction of appellant of receiving, or can substitute a conviction of receiving for that of appellant.

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The LORD CHIEF JUSTICE: No doubt, if this case had been conducted as it should have been, there were materials on which the jury might have convicted appellant of shopbreaking and larceny, or of receiving. Mrs. Mummery's evidence was sufficient, if the jury took that view, to get rid of the exculpatory evidence of Lever, but it could not be affirmative evidence going to show the guilt of appellant, behind whose back Lever's statement had been made. When one looks at the summing-up, it is apparent that Mrs. Mummery's evidence is pointedly employed to show that appellant was one of those who had broken into the kiosk. It is impossible to say that with a proper direction the jury must certainly have come to a like conclusion on the issue of housebreaking and larceny. The charge of receiving was never really pressed; if it had been, appellant might have given evidence to explain matters which otherwise remained unexplained. It is therefore impossible to say that the jury must certainly have convicted appellant of receiving if they had had a proper direction.

Conviction quashed.

G. B.

THOMAS DWYER.

ALLEN FERGUSON.

Photographs of suspected persons, whose arrest is under consideration, may be shown by the police for the purposes of recognition, but persons recognising them should not, if it can be avoided, be afterwards asked to identify them at the trial; if they are, all the facts of the recognition should be disclosed.

Appeals against conviction and sentence.

Appellants were convicted on October 31st, 1924, before Lush J. at Monmouth Assizes of housebreaking, Dwyer was sentenced to six months' imprisonment with hard labour, and Ferguson to fifteen months' imprisonment with hard labour.

Ida Duncan for the appellants (under s. 10 of the Criminal Appeal Act, 1907), who were present. The whole issue raised at the trial was that of the identification of appellants. Before the identification at the police station the police had shown to the

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identifying witnesses two photographs—full-face and profile—of each appellant. Each of these was shown separately and not as part of an uniform series. The identification, therefore, was thoroughly unsatisfactory. *Goss*, 17 Cr. App. R. 196: 1923: c. q.; *Chadwick*, 12 Cr. App. R. 247: 1917: c. q. Moreover, the photographs, which showed the men wearing obvious prison numbers, were put in by a police witness, were examined by the jury, and were stated by the witness in the hearing of the jury to have come from the custody of the police.

Raglan Somerset for the Crown. The case against appellants did not rest on the identification alone. The photographs were shown to the witnesses for the purposes of arrest, and not of identification. I have no instructions to press this matter, but it is submitted that there was some other evidence to go to the jury on which they could properly convict appellants. He referred to *Kingsland*, 14 Cr. App. R. 8: 1919; and *Melaney*, 18 Cr. App. R. 2: 1924.

The LORD CHIEF JUSTICE (*a*): These two appellants were convicted of breaking and entering a house and stealing rings, watches and other things. Dwyer was sentenced to six months' imprisonment with hard labour, and Ferguson was sentenced to fifteen months' imprisonment with hard labour. Appellants now appeal against conviction and sentence.

The real question in this case was a question of identity. The facts, shortly, were that on September 29th last, at a quarter past five o'clock in the afternoon or thereabouts, a Mrs. Williams left her house apparently safe. At about a quarter to eight, that is to say, when it was somewhat dark, the next door neighbour, Mrs. Jones, heard noises coming from the inside of Mrs. Williams' house, and she also noticed a flashlight in the bedroom. She called another neighbour, a Mr. Rees, and a son-in-law of Mrs. Williams, Mr. James Williams. They went to the house of Mrs. Williams, and Mrs. Jones saw a man in a dark suit standing at the next door gate near an electrical standard, and that man, she said, was whistling. James Williams and Thomas Rees also saw a man standing at the electrical lamp and heard him

(*a*) This judgment is printed from a transcript from shorthand supplied by the courtesy of the Director of Public Prosecutions.

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whistling. They went into the house, and as they were going Mrs. Williams saw a man in a brown suit come out and jump from an upstairs window. The witness Rees, after going into the house, came out again, and he said that some time later in the evening he saw the man whom he had seen at the gate walking down the road.

The trial was perfectly satisfactory except in two respects, each of which was crucial. In the first place, it was made plain that the witnesses who were to identify the defendants, witnesses who had seen them in the dusk or in the dark, had been shown extremely good photographs of them before they were invited to enter on the task of identification. It is quite true, as counsel has urged on behalf of the Crown, that the police, in showing those photographs to the persons who afterwards became witnesses, were not at all intending to influence them in the task of identification, or to equip them for it. On the contrary, they were seeking only to ascertain who were the persons proper to be arrested. The fact remained, however, that the witnesses on whose testimony the identification depended had seen very good photographs of each of the accused persons before the process of identification was formally entered upon. In the second place, during the trial photographs of the two defendants were actually produced for the inspection of the jury, and were inspected by the jury. Those photographs are now before the Court. There are two photographs, that is to say, there are two documents; each contains two photographs. One document refers to one prisoner; the other document to the other prisoner, and there is shown with great clearness upon each of these documents a photograph full-face and profile of the prisoner referred to, and the prisoner is wearing upon his right breast a large ticket stamped with the prison number. Those photographs having been handed to the members of the jury, it was apparent to the jury that the defendants had been previously convicted. It was just as clear a statement to the jury that the defendants had been previously convicted as would have been sworn evidence to that effect. In those circumstances counsel, who has urged the case of these appellants with so much clearness and force, says that these convictions cannot stand. In the opinion of this Court that is right. The appeals must be allowed and the convictions quashed.

The Court has been asked to formulate some principles relating to the use of photographs in the detection and the punishment of

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crime. It is not possible, nor, indeed, would it be useful, to attempt to produce a series of rules upon that matter. They are to be collected from the various cases which have been decided on the subject. But this observation is to be added; the circumstances of different cases differ greatly, and it is not easy to lay down general rules. One distinction, however, is quite clear. It is one thing for a police officer, who is in doubt upon the question who shall be arrested, to show a photograph to another person in order to obtain information or a clue upon that matter; it is another thing for a police officer dealing with witnesses who are afterwards to be called as identifying witnesses to show to those persons photographs of those whom they are about to be asked to identify beforehand. It is clearly illegitimate, it would be most improper, to inform a witness beforehand who is to be called as an identifying witness by the process of making the features of the accused familiar to him through a photograph. But even where the photographs are employed to obtain information on the question of arrest, it is fair that all proper precautions should be observed. I shall not attempt to enumerate possible contingencies, but it would be manifestly open to remark if, in a doubtful case, the police were to show one photograph or two to a person who was supposed to be able to give information and then obtain assent to act on that information. The fair thing is, as was said in *Melaney* (above), to show a series of photographs, and to see if the person who is expected to give information can pick out the prospective defendant. And where that process has been gone through, no matter with what care, it is quite evident that afterwards the witness who has so acted is not a useful witness for the purpose of identification, or, at any rate, his evidence for the purpose of identification is to be taken subject to this—that he has previously seen a photograph.

As I said, it is not easy, certainly not upon the spur of the moment, to formulate rules, but in this matter, as in all matters, as has so often been said in this Court, it is the duty of the police to behave with exemplary fairness, remembering always that the Crown has no interest in securing a conviction, but has only an interest in convicting the right person. These appeals are allowed.

Convictions quashed.

G. B.

HOWARD BALL.

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8 *December.*

Hewart L.C.J.
Shearman J.
Salter J.

On a trial for murder, the defence of manslaughter ought not to be withdrawn from the jury where there is evidence to support it.

Application for leave to appeal against conviction.

The applicant was convicted on November 18th, 1924, before Mr. Commissioner Hollis Walker, K.C., at Warwick Assizes, of murder, and was sentenced to death.

Application was treated as a final appeal.

Douglas Jenkins for the applicant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Applicant was convicted of the murder of one James Rice, who for some time had been doing his best to entice away Ball's wife. On the day of the crime Mrs. Ball said that she was going out to a shop. Ball followed and found that, instead of doing so, she had gone to meet Rice. He discovered them walking in a field; Rice had his arm round Mrs. Ball's waist. After some altercation applicant pulled out a revolver and fired and killed Rice. This was a case where applicant killed Rice "in the heat of blood," and the law will "not deem it murder, but lowers the offence to manslaughter," per Holroyd J., in *Meade's and Belt's Case,* 1 Lewin, C. C. at p. 185: 1823. The facts disclosed such provocation as should have been left to the jury to ascribe the killing, if they wished, to the influence of passion: *Lesbini,* 11 Cr. App R. 7; 1914, 3 K. B. 1116; 84 L. J. K. B. 1102; 112 L. T. 175. Even if the main defence at the trial was that of self-defence (for there was evidence that Rice had threatened Ball on various occasions, and that Ball had reason to fear on this occasion that he was armed), the judge should have left the question of provocation to the jury: *W. Hopper,* 1915, 2 K. B. 431; 84 L. J. K. B. 1371; 113 L. T. 381; 79 J. P. 335; 25 Cox, C. C. 34; 59 S. J. 478; 31 T. L. R. 360; 11 Cr. App. R. 136: verdict of manslaughter substituted.

Maurice Healy (*G. H. Walmisley* with him) for the Crown. This case is more akin to *R. Gorges,* 85 L. J. K. B. 1049; 114 L. T 77; 25 Cox, C. C. 218; 11 Cr. App. R. 259: 1915, where it was held that a judge need not deal fully with a mere

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secondary defence, than to *Hopper*. The question of provocation was not withdrawn from the jury; on the contrary, it was sufficiently left to them.

The LORD CHIEF JUSTICE: In this case there were materials on which the jury, if they accepted certain evidence and took a certain view, might have reduced their verdict to one of manslaughter. If the questions relating to manslaughter and the evidence bearing on them had been adequately laid before the jury, and the jury had, nevertheless, convicted appellant of murder, it would not have been possible for this Court to interfere. But, when one looks at the summing up, it is evident that the contentions made by the defence that the crime, if any, was manslaughter and not murder were not only not put to the jury, but were clearly withdrawn from them. Language was employed which seemed to be based on the view that, by that time at any rate, the question of a verdict of manslaughter had ceased to be of any importance. It is unnecessary to express an opinion on the weight to be attached to the considerations which, the jury might have thought, would tend to persuade them to return a verdict of manslaughter. Certainly it would be ludicrous to suggest that in this country the knowledge that a man's wife has been debauched by another man is an excuse for shooting the offender. But there are materials here of a sort, and it is not possible to say that, if they had been left to the jury with an adequate direction, the jury "must certainly," as one phrase is, or "would inevitably," according to another phrase, have come to the conclusion that this was a case of murder. Looking at the course which the trial took, this Court is of opinion that there should be substituted a verdict of manslaughter for the verdict of murder, and that the proper sentence to be passed is one of seven years' penal servitude.

Verdict of manslaughter substituted.

Sentence varied.

G. B.

JOHN PHILLIPS.

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10 *December.*

Hewart L.C.J.
Shearman J.
Salter J.

Where the defence is an alibi, *the jury must be pointedly directed on the identification.*

Appeal against conviction and sentence.

The appellant was convicted on October 30th, 1924, before Avory J., at Liverpool Assizes, of warehouse breaking, and was sentenced to twelve months' imprisonment with hard labour.

Elliott Gorst for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was charged with warehouse breaking with a man named Burgess. Evidence was given that on October 5th, at 10.45 p.m., a dark and very wet night, the two defendants and a third man were surprised by a police constable trying to break open a warehouse door, and that they separated and ran away. The whole case of the prosecution against the appellant rested on the evidence of one witness, whose name was Nuttall, a stranger to appellant, who had a momentary view of one of the men running away, and purported to identify him as appellant. Nevertheless, in summing up the judge failed to point out to the jury that only one witness spoke to the identification of appellant, and that his view of the man was of the most unsatisfactory kind. It is submitted that the fact that the jury does not accept an *alibi* does not in itself justify a verdict of guilty. [He was stopped.]

O. S. Hooper for the Crown. The circumstances of the identification were admittedly not brought before the jury by the judge in summing up, but the whole facts of the case were before the jury, and there was evidence on which they could convict the appellant.

The Lord Chief Justice: The evidence of identification in this case was weak. It is not, of course, to be said that a person is not to be convicted on the testimony of one witness identifying him, but where the circumstances are those of the present case—where the identifying witness is a stranger to the defendant and

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the physical circumstances are those to which reference has been made—it is right that the attention of the jury should be directed to the weakness of the evidence. If, after such a direction, the jury think it right to convict, that is one thing; it is another thing where, as here, there is no reference in the summing up at all to the fact that there is only one witness to identity. Indeed, it is possible that the jury in the present case may have received the impression that the evidence of identification against appellant was similar to that against Burgess. In these circumstances this conviction cannot stand.

Conviction quashed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE SALTER.

15 *December.*

JOHN THOMAS COX.

Severity of sentence.

Appeal against conviction and sentence.

The appellant was convicted on November 8th, 1924, before Mr. Commissioner Hollis Walker, K.C., at Derby Assizes, of wounding with intent to do grievous bodily harm, and was sentenced to eighteen months' imprisonment with hard labour.

Sir Henry Maddocks, K.C. (with him *Norman Winning*), for appellant, submitted that the conviction was bad in view of misdirection and non-direction of the jury by the Commissioner, and that the sentence was excessive by reason of the age of appellant (47 years) and his previous good character.

Allsebrook for the Crown was not called on.

The LORD CHIEF JUSTICE: The case for the prosecution was that on Sunday, June 15th, 1924, the appellant threw pepper

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into the face of a man named Parkinson and inflicted wounds on him with a stick. There is no defect in the summing-up, and the appeal against conviction, therefore, fails. With regard to the sentence, however, it is quite true that the appellant, who is about 50 years of age, had not been previously convicted of any crime, and in view of all the circumstances, and perhaps not least in view of what he said, and may have truly said, namely, that he was provoked to do what he did, the Court thinks that this sentence may properly be reduced to one of twelve months' imprisonment with hard labour.

Sentence reduced.

Solicitor for the Appellant—*Bendle W. Moore,* Derby.

G. B.

MARGARET JANE TAYLOR.

When two persons are jointly indicted for conspiracy, and also (in other counts) for other offences, it is wrong to lead the jury to believe that unless both are convicted, neither may be convicted on one of the other counts.

Appeal against conviction.

Appellant was convicted on November 10th, 1924, before Talbot J., at Durham Assizes, of conspiracy to defraud, obtaining a valuable security by false pretences, and demanding money on a forged document. On November 13th she was sentenced to nine months' imprisonment in the second division.

Paley Scott for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. Appellant kept a grocer's shop at Jarrow. She was charged with a man named Thompson, a guardians' officer, the theory of the prosecution being that Thompson made out vouchers for groceries as outdoor relief for persons who, he knew, would not be receiving relief at that time, and that he conveyed those vouchers to appellant, who forged the receipt to them, presented them to the guardians for payment, and shared the proceeds with Thompson. The only evidence against appellant was the evidence of an expert that some of the

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receipts on the vouchers were in her handwriting. It was quite possible that Thompson could be guilty and appellant innocent *of other counts of the indictment,* but the judge, in summing-up, failed to direct the jury that that was so, and directed them that they must convict both or neither. He led the jury to believe that only a conspiracy between the two would explain Thompson's fraud, whereas it was capable of several explanations consistent with Taylor's innocence.

Ronald Powell for the Crown dealt only with the facts. There was evidence against appellant on the charge of conspiracy, and the summing-up was unassailable on that point. If the Court thinks that appellant was properly convicted on that count of the indictment the Court has power to confirm that conviction.

The LORD CHIEF JUSTICE: The main ground of appeal in this case is that the real defence of appellant was to all intents and purposes withdrawn from the jury. The facts proved might be variously explained. Thompson might have been acting with appellant; but he might have been acting with other persons to whom he handed the vouchers and from whom he received consideration for his fraud, and those persons might have handed them to third or fourth persons that they might go and get the goods from appellant. The case, however, was left to the jury on the footing that Thompson, against whom the case was strong, could not be convicted unless appellant was also convicted. This conviction cannot be supported, and it must be quashed.

Conviction quashed.

G. B.

GEORGE STOKELL.

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No misconduct, whether criminal or not, may be given in evidence on the trial of an allegation of being a habitual criminal unless (the statutory) notice thereof has been served.

The proviso to s. 4 of the Criminal Appeal Act applied.

Appeal against conviction as habitual criminal.

Appellant was convicted on November 11th, 1924, before Talbot J. at Durham Assizes of burglary, and was sentenced to three years' penal servitude; and he was also convicted of being a habitual criminal, and was sentenced to five years' preventive detention.

Russell Vick for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The statutory notice served on appellant of intention to charge him with being a habitual criminal alleged (a) a previous conviction in 1910 as a habitual criminal, and (b) persistently leading a dishonest and criminal life. Particulars were given of (b), but the police in evidence stated two matters (namely, that while released on licence appellant had failed to report and had had to be "circularised," and that during a period in which he was working as a night-watchman he had associated with known thieves) which were not specified in the particulars. Those matters being before the jury, the conviction of appellant was unsatisfactory and should be quashed.

He referred to *Wilkins, Harris and Others*, 1922, 2 K. B. 543; 91 L. J. K. B. 587; 126 L. T. 639; 86 J. P. 105; 38 T. L. R. 343; 16 Cr. App. R. 96: convictions (as habitual criminal) quashed; *Stockdale*, 11 Cr. App. R. 108: 1915: c. (as habitual criminal) q.; and *Baxter*, 18 Cr. App. R. 127: 1924: c. (as habitual criminal) q.

Bertrand Watson for the Crown was not called on to argue.

The Lord Chief Justice: It is said that the admission of the two pieces of evidence to which reference has been made is so important as to make the conviction of the appellant a mis-

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carriage of justice. It would be deplorable if anything which this Court was to say was suggested to subtract from the gravity of the rule which has been laid down by this Court regarding the care to be observed in the administration of the Prevention of Crime Act, 1908. In *Stockdale* (above), Bray J. said (referring to *Neilson*, 78 J. P. 158; 30 T. L. R. 125; 9 Cr. App. R. 218: 1913: c. (as habitual criminal) q.): "'Although when one looks at the appellant's record it is almost certain that the jury would have come to the same conclusion, we cannot say that they would have done so if this evidence had not been admitted.' We must see what the facts are." In *Wilkins*, Lord Trevethin C. J. said: "Counsel for the prosecution should especially be careful to observe the grounds alleged in the notice of the Director of Public Prosecutions, and to see that his witnesses do not run on and give evidence of facts not set out in such notice. . . . It is not permissible to prove any conviction unless it has been set out in the notice given before trial. Nor, again, is it permissible to prove conduct which has not formed the subject of a conviction, *e.g.*, conduct of a dishonest character, unless the facts relating thereto have been set out in such notice."

Not one word is to be subtracted from the effect of judgments of that kind, but, as Bray J. said, this Court must look at the facts of the case to see whether the jury clearly, in the absence of that which was improperly admitted, must certainly, or would inevitably, have come to the same conclusion. That is the test. The record of appellant is so irresistible that in the opinion of the Court, most regrettable as was the admission of the evidence complained of, there was no miscarriage of justice. This appeal is therefore dismissed.

Appeal dismissed.

G. B.

DAVIS HARRIS.

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Hewart L.C.J.
Avory J.
Salter J.

The offence of being in possession of housebreaking implements "by night" is not constituted by possession after arrest: they must be "found" in possession after 9 p.m.

A defendant who has pleaded not guilty on arraignment should not be immediately arraigned on another indictment alleging a previous conviction.

Appeal against conviction and sentence.

Appellant was convicted on November 6th, 1924, before Swift J. at Chelmsford Assizes of having been found by night having housebreaking implements in his possession, and was sentenced to five years' penal servitude.

St. John Hutchinson for the appellant, who was not present. The question in dispute at the trial was that of time. The offence with which appellant was charged was under s. 28, sub-s. 2, of the Larceny Act, 1916, which provides that every person who shall be found by night having in his possession, without lawful excuse, any implement of housebreaking, shall be guilty of a misdemeanour. S. 46, sub-s. 1, defines the expression "night" as being the interval between 9 p.m. and 6 a.m. of the next succeeding day. On October 21st a police officer named Barron was on duty on the Western Esplanade, Westcliff, as he said, just after 9 p.m. As he was passing a shelter he saw two men sitting in it. He observed that they had something between them on the seat which they appeared to be trying to hide. He asked them what they had got, and both of them jumped up and ran away. The officer caught appellant just outside the shelter. There was a struggle and appellant was arrested. The officer then took him back into the shelter, and on the seat he found a rope ladder and a jemmy. The officer thereupon took appellant to the police station, which was 1,283 yards away, about ten minutes' walk. The officer said that from the time he first saw the appellant until the time he left the shelter was not more than five minutes. Another police officer named Lindsay met Barron and appellant at about 9.15, and it was between 9.17 and 9.18 that they got to the police station. The police sergeant in charge said that it was 9.15 that they entered the station, and another police officer said that it was 9.14. The learned judge ought to have directed the

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jury that the prosecution must satisfy them that appellant was found in possession of housebreaking implements after 9 p.m., but he failed to do so. If a man could be convicted of this offence on the facts in this case he might be arrested early in the day, kept in custody until after 9 p.m., and then searched and found to be in possession of housebreaking implements. Moreover, the clerk of assize had no right, after arraigning appellant on the indictment containing the charge under s. 28 (2) of the Larceny Act, 1916, to arraign him on a second indictment under s. 7 of the Prevention of Crimes Act, 1871, which contained the allegation that appellant had been previously convicted, such second arraignment being in the presence of persons in Court, some of whom would form the jury to try appellant on the first indictment.

St. John Morrow for the Crown. The conviction is good. The implements remained in the possession of appellant after he had been arrested, and he was therefore found in possession of them after 9 p.m. A man who leaves property for a moment with a view to escaping from the police is still in possession of the property. If he leaves it with the intention to return he is in constructive possession of it.

The LORD CHIEF JUSTICE: Upon the facts of this case it may well be that there was some evidence that appellant had been found by night in the possession by night of housebreaking implements, but there was also no little evidence the other way. It was of crucial importance that the minds of the jury should be directed to the real problem. The judge, in summing-up, said: "It does not matter whether it was 9 p.m. that the officer first saw the men in the shelter or not. The point you must direct your minds to is: What time was it that the police officer arrested appellant and took him back to the shelter and there for the first time discovered the housebreaking implements? If that was after 9 p.m. I tell you, as a matter of law, that that was the moment at which he was found in possession of the things." That direction, unfortunately, was incorrect. To prove the offence with which appellant was charged, it must be shown that he was found by night in possession by night of housebreaking implements. The direction which Swift J. gave to the jury in this case suggested that it might be sufficient if a man were found by night who

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had been by day in possession of housebreaking implements. In view of that direction to the jury, and in view of the fact that there were materials upon which the jury might come to the conclusion that the possession required was possession by day, it is apparent that this conviction cannot stand. On the true construction of this section the finding and the possession must both be by night and the possession must be the possession by a free man. Possession after arrest does not satisfy the requirements of the statute. If it were otherwise a person might be arrested by day and then after 9 p.m., being in custody, he might be found to be in possession of housebreaking implements and charged under the section. The judge has invited the attention of this Court to another section of another statute where criminal possession is defined for the purposes of that statute, namely, s. 15 of the Forgery Act, 1913. In the opinion of this Court that section deals with a different subject-matter. The possession referred to in s. 28, sub-s. (2) of the Act of 1916, is physical possession and not constructive possession.

It is right that I should also refer to what took place on the arraignment of appellant. There were two indictments against him, and the second of them charged him with having been found in the shelter waiting for an opportunity to commit burglary, and that on April 13th, 1920, at the Central Criminal Court, he had been convicted on indictment of shopbreaking, when a previous conviction for felony was proved against him. The prisoner had to answer to that indictment. We are told by counsel that there can be no doubt that the second indictment was put to appellant before his trial on the first indictment in the presence of those who afterwards, as jurors, had to try him. That practice is wrong. Where a person has pleaded "Not guilty" to an indictment and is about to stand his trial, he ought not to be invited to plead to another indictment which recites a previous conviction in the presence of those who, as jurors, will have to try him.

Conviction quashed.

Solicitors for Appellant—*H. Flint & Co.*

G. B.

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18 *December.*

ISRAEL JAMES HUSSEY.

Hewart L.C.J.
Avory J.
Salter J.

It is still law that a householder may use all necessary force against a trespasser who invades the house.

Appeal against conviction and sentence.

Appellant was convicted on November 13th, 1924, before Acton J. at the Central Criminal Court of unlawful wounding, and was sentenced to twelve months' imprisonment with hard labour.

Marston Garsia for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. In June, 1924, appellant rented a room at Brixton from a Mrs. West. In July Mrs. West purported to give him an oral notice to quit, which he contended was not a valid notice. Because he refused to vacate the room Mrs. West, a woman named Mrs. Gould, and a man named Crook, armed with a hammer, a spanner, a poker and a chisel, tried to force their way into the room, the door of which the appellant had barricaded. A panel of the door was broken, and appellant thereupon fired through the opening and Mrs. Gould and Crook were wounded. At no place in the summing-up was the attention of the jury drawn to the distinction in law between what is permissible in self-defence and what is permissible in defence of one's house: Archbold's *Criminal Pleading, Evidence and Practice,* 26th ed. p. 887. On the contrary, the matter was treated throughout as if only the law of self-defence was applicable.

[He was stopped.]

Eustace Fulton for the Crown. The question now raised was never urged at the trial, where the defence was that the violence used by appellant was necessary to protect his life and that of his wife and children. The rule of law referred to in Archbold (above) is a very ancient one, and belonged to the days when persons went out with armed retainers to seize other persons' lands. It is no longer to be observed. The rights of a tenant now depend on the amount of the force brought against him. Appellant

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made no attempt to use lesser methods. With a proper direction the jury would have come to the same conclusion.

The LORD CHIEF JUSTICE: No sufficient notice had been given to appellant to quit his room, and therefore he was in the position of a man who was defending his house. In Archbold's Criminal Pleading, Evidence and Practice, 26th ed. p. 887, it appears that: "In defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might, by law, kill in self-defence a man who attacks him personally; with this distinction, however, that in defending his home he need not retreat, as in other cases of self-defence, for that would be giving up his house to his adversary." That is still the law, but not one word was said about that distinction in the summing-up, which proceeded on the foundation that the defence was the ordinary one of self-defence. The jury, by their verdict, negatived felonious intent, and with a proper direction they might have come to a different conclusion. This appeal must therefore be allowed.

Conviction quashed.

G. B.

ALFRED TURNER.

Previous convictions of a prisoner on trial must be strictly proved.

Appeal against sentence.

Appellant was convicted on November 14th, 1924, before Talbot J. at Durham Assizes of rape, and was sentenced to ten years' penal servitude.

Appellant was not represented and did not appear.

Morley, for the Crown, referred to *J. Seymour,* 17 Cr. App. R. 128; 87 J. P. 148: 1923: sentence reduced; and *W. R. Finney,* 18 Cr. App. R. 41: 1924.

The LORD CHIEF JUSTICE: This was a bad case of rape. The sentence passed on appellant was passed on him on the acceptance

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of a statement that he had previously been convicted of rape, and had been sentenced to five years' penal servitude. No evidence was called to prove that conviction. The written statement was merely placed before the judge. No person testified to the allegation so that he might have been cross-examined on it by appellant. It cannot too clearly be understood that where previous convictions are relied on for any purpose in a trial they must be either (a) proved by lawful evidence, or (b) expressly admitted by the accused person. In the circumstances the sentence of appellant will be reduced to one of seven years' penal servitude.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE ACTON.

ARTHUR ROBERT CANHAM. 1925 12 *January.*

The Court will, if it thinks fit, hear a plea of insanity even though it was not raised at the trial.

Application for leave to appeal.

Prisoner was convicted of murder at the Central Criminal Court on December 15th, 1924, and sentenced to death by Shearman J.

Fox-Davies for the applicant (under s. 10 of the Criminal Appeal Act, 1907), who was present.

G. D. Roberts for the Crown.

AVORY J., commenting on a remark let fall by the applicant's counsel, cited s. 5 (4) of the Criminal Appeal Act: "If . . . it appears to the Court of Criminal Appeal that although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the Court may quash the sentence passed at the trial, and order the appellant to be kept in custody as a criminal lunatic . . ." and pointed out that in *Hopper*, 11 Cr. App. R. 136: 1915, and *A. Beard*, 14 Cr. App. R. 110: 1919, it had done so. The Court had, in fact, substituted a verdict of guilty but insane in a trial for murder in which the defence of insanity had not been set up.

The LORD CHIEF JUSTICE, in delivering judgment, remarked that there was no rule in that Court that insanity could not be urged as a ground of appeal unless it had been pleaded in the Court below.

Application dismissed.

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FRANCIS DENHAM MARSHALL.

In a direction upon the evidence of children of tender years, there must be a clear warning about the nature of such evidence.

It is wrong to invite a jury to consider whether defendant is "the sort of person" likely to commit the offence charged.

Appeal against conviction and sentence.

Appellant was convicted on November 26th, 1924, before Swift J. at Hertford Assizes of indecent assault, and was sentenced to fifteen months' imprisonment in the second division, and was ordered to pay the costs of the prosecution.

Eustace Fulton for the appellant, who was present. The conviction of appellant should be quashed on the ground that the judge at the trial misdirected the jury. In the first place, he failed to warn them of the danger of accepting without careful scrutiny the uncorroborated testimony of little children, three of whom gave evidence against appellant; in the second place, he told the jury that either the witnesses were lying, in which case appellant was entitled to an acquittal, or they were telling the truth, in which case appellant must be convicted. He ruled out the possibility of the children's being mistaken, or having imagined what they said occurred, or having reproduced what had unconsciously been suggested to them, but whether the possibility should be accorded weight or should be negatived was a question for the jury and not for the judge. Moreover, the judge elicited from a medical witness that habitual alcoholism would render a man prone to commit such a crime as that with which appellant was charged, and told the jury in summing-up that appellant had been drinking heavily for some time before the crime, of which there was no evidence.

[He was stopped.]

Cassels, K.C. (with him *Tindal Atkinson*) for the Crown. The little girls corroborated the evidence of each other; there was no need for the judge to warn the jury of the danger of acting on such evidence. It was a question of degree. The summing-up fairly put before the jury the issue regarding the effect of the children's evidence. The direction regarding appel-

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lant's drinking was in accordance with the evidence, and the true meaning was given to the statements of witnesses.

The LORD CHIEF JUSTICE: The appellant was convicted of an indecent assault on a girl aged ten years. The prosecution sought to prove that on September 7th, 1924, the child went with three other children to appellant's house to hear his gramophone, and that appellant behaved indecently towards all the children, and assaulted at least that one of them regarding whom he was charged. The appellant denied that there was any truth in the complaint. The criticism which has been made is directed to the summing-up, and it involves three matters which are closely related to each other. In the opinion of this Court there is much in these criticisms. It cannot be said that the summing-up is satisfactory. Nor can we say that with a proper direction the jury would inevitably have come to the same conclusion. This appeal must, therefore, be allowed. It only remains to add two observations. One is that where the evidence of young children is under consideration a clear and full warning about the nature of that evidence should be given to the jury. Secondly, it is not merely perilous, but wrong to indicate to the jury in any way that in deciding whether or not the defendant is guilty, they should consider whether in the evidence there is something which makes him appear to be the sort of person who would be likely to commit such an offence.

Conviction quashed.

Solicitor for the Appellant—*W. J. Watts Miller.*

Solicitor for the Crown—*Passingham and Hill,* Hitchin.

G. B.

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WILLIAM CLARKE.

Indictments should not be multiplied, but where the law permits separate offences should be charged in separate counts of one indictment.

Proviso to s. 4 of the Criminal Appeal Act applied.

Appeal against sentence.

Appellant was convicted on September 29th, 1924, before the Chairman at Middlesex Sessions of workshop-breaking and office-breaking, and was sentenced on November 29th, 1924, to two consecutive sentences of nine months' imprisonment with hard labour.

Appellant appeared in person, and added nothing to the written statement which he had submitted to the Court.

The Crown was not represented.

The Lord Chief Justice: It is to be observed that the two offences with which appellant was charged should have been alleged in two separate counts of the same indictment, instead of in two separate indictments, as was done. The crimes of which appellant was convicted were committed in July, 1924. In October he was bound over at the London Sessions in respect of wholly different matters. It is clear that the Chairman, in passing the present sentence on appellant, thought that he had committed these offences after, and not before, he had been very leniently treated at the London Sessions. In view, however, of the previous record of appellant and, not less, of the present extraordinary prevalence of housebreaking, burglary, and kindred offences, the Court thinks that this sentence is not excessive, and, in spite of the Chairman's misapprehension of the fact, the Court will not interfere with it.

Appeal dismissed.

G. B.

WILLIAM THOMPSON.

1925
26 *January.*

Hewart L.C.J.
Avory J.
Acton J.

An appellant may only in exceptional circumstances consent by counsel to be absent.

Appeal against conviction and sentence.

Appellant was convicted on November 11th, 1924, before Talbot J., at Durham Assizes, of obtaining by false pretences, and was sentenced on November 13th, 1924, to twelve months' imprisonment in the second division. He was tried jointly with *M. J. Taylor,* whose conviction was quashed: above, p. 153.

When the appeal was called on the Lord Chief Justice drew attention to the fact that, although appellant had expressed a desire to be present on the hearing of the appeal, he had not been brought up. The Court had given leave to appeal solely that the appellant might raise a point of law, viz., that the record of conviction might be amended in view of *Taylor's* appeal, but it appeared that in his notice of appeal the appellant stated that he desired to appeal "against my conviction and against my sentence": there had been no reference to sentence in the preliminary application for extension of time, so that strictly it was not open to appellant to raise that point, hence no question of fact was in issue. In *Dunleavey,* 1909, 1 K. B. 200; 78 L. J. K. B. 359; 100 L. T. 240; 21 Cox, C. C. 760; 1 Cr. App. R. 212, 240, this Court considered s. 11 of the Criminal Appeal Act, 1907. His Lordship asked *Streatfeild,* for the appellant, whether he desired that the appellant should be present simply because the words "and against my sentence" were in the notice.

Streatfeild. I am instructed that the appellant would prefer the case to be disposed of to-day.

The Lord Chief Justice: If there were questions of fact to be discussed other considerations might arise.

The appeal was then argued, but raised no matter of legal interest.

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Streatfeild then asked to be heard on the question of sentence, and the Court granted him leave to argue that it should be reduced.

Ronald Powell for the Crown.

The Court dismissed the appeal both against conviction and against sentence.

Solicitor for the appellant—*F. J. Lambert,* Gateshead.

Appeal dismissed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE FRASER.

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2 *February.*

JOHN HARDY, ALIAS REGINALD MARCUS EMMETT.

Sentence mitigated in view of youth.

Appeal against sentence.

Appellant was convicted on January 8th, 1925, before the Chairman at Carnarvonshire Sessions of obtaining goods, money and credit by fraud and false pretences, and was sentenced to two years' imprisonment with hard labour.

Appellant, in person, added nothing to his grounds of appeal.

The Crown was not represented by counsel.

The LORD CHIEF JUSTICE: On May 14th, 1924, appellant went to a hotel at Bangor and engaged a room. When a bill for 14*s.* 6*d.* was presented to him he persuaded the bookkeeper to cash a cheque for 5*l.* and to hand him the change, 4*l.* 5*s.* 6*d.* The cheque was returned marked "no account." When he was sentenced other charges against him of stealing and obtaining by

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JOHN HARDY, *alias* REGINALD MARCUS EMMETT.

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false pretences were taken into consideration. With regard to his previous record—in 1920 he was put on probation for housebreaking; in 1921 he received two sentences, of six and of nine months' imprisonment, for obtaining credit by fraud; in 1923 he was sentenced at Edinburgh Sheriff's Court to six months' imprisonment with hard labour on charges of fraud, six other charges being taken into consideration. It may be that if all the materials had been before the Court at Edinburgh a more severe sentence would have been passed, but looking at all the circumstances, and not least at the comparative youth of the appellant—he is now twenty-six years old—this Court is of opinion that this sentence of two years' imprisonment with hard labour may properly be reduced to one of twelve months' imprisonment with hard labour.

Sentence reduced.

G. B.

AMELIA HAYTON.

A direction must make it clear that the onus *of proof is on the prosecution.*

Appeal against conviction and sentence.

Appellant was convicted on January 9th, 1925, before the Chairman at Westmorland Sessions of larceny, and was sentenced to three months' imprisonment in the second division.

Beck, for the appellant, was not called on to argue.

N. Helme, for the Crown, did not support the conviction, except to say that the summing-up appeared substantially to put before the jury the question which they had to decide.

The LORD CHIEF JUSTICE: The appellant was convicted of the larceny of a rug which was exposed for sale at the Market Hall, Kendal. The case for the defence was that the rug had been bought by appellant in 1912. There was a considerable mass of evidence, and two things were essential in the summing-up in such a case—(a) the evidence should have been carefully sifted

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and marshalled; (b) it should have been made quite clear to the jury that the burden of proof rested on the prosecution. The summing-up fills about half a page of the transcript of the shorthand note; neither of the essential matters to which I have referred was approached. This appeal must therefore be allowed.

Conviction quashed.

Solicitor for appellant—*G. E. Cartmel,* Kendal.

G. B.

FRANK SMITH.

An appeal lies against a sentence passed on an alleged breach of recognisance, on the ground that no breach of the recognisance was proved.
Breach of recognisance, unless admitted, must be strictly proved.
Callaghan, 8 *Cr. App. R.* 185; 1913, *considered.*

Appeal against sentence.

The appellant was convicted on October 14th, 1924, before the Chairman, at the East Sussex Sessions, of larceny, and on January 6th, 1925, he was sentenced to eighteen months' imprisonment with hard labour.

Reginald Blaker for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was convicted on his own confession of stealing a motor car in August, 1921, He was released on his own recognisances, which bound him over in a sum of £50 to be of good behaviour for two years and to come up for judgment if called upon. He was again convicted on December 1st, 1924, at Spelthorne Petty Sessions, for stealing in October, 1924, a motor car rug and a child's magic lantern. He was sentenced to one day's imprisonment. On January 6th, 1924, he was brought up on a warrant before the East Sussex Quarter Sessions to receive judgment for the motor car theft on the ground that he had broken and forfeited his recognisance. He was then sentenced to eighteen months' imprisonment with hard labour, against which he appealed. There was no evidence

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that the offence committed in October, 1924, was after the date on which the recognisance began to run. Appellant had maintained that it was before. The Chairman of the Quarter Sessions said that all that the Bench wanted to know was why the recognisance had been broken, and why appellant had not reported in the ordinary way. The theft of the rug was regarded as the essential grounds of the breach of the recognisance. Appellant was not told that he could cross-examine any witnesses and call evidence on his own behalf. In those circumstances the sentence cannot stand.

Ronald Powell for the Crown. Quite apart from the question whether appellant had or had not stolen the rug and lantern after the conviction on October 14th, 1924, there was evidence by his employer, who had given him a good character at the trial on October 14th, that he had stolen certain articles, including a ring, and that he was a drunkard and a liar. In those circumstances appellant had broken his recognisance to be of good behaviour. Those facts were before the Quarter Sessions, and he was sentenced.

SALTER J.: Where a person is convicted and released on recognisance, and is later brought up for punishment on an allegation that he has broken his recognisance, it rests on those who bring him up to satisfy the Court that the recognisance has been broken. Unless it is admitted, the breach must be proved by sworn evidence, and the defendant or his representatives should be allowed to cross-examine all the witnesses who are called to prove it. He should be allowed to call witnesses to show that the recognisance has not been broken, and to give evidence on oath if he so desires. In the present case none of those things had been done. The question whether or not there has been a breach of recognisance is one of fact to be decided by the judge and not by a jury.

A question arises whether an appeal lies to the Court of Criminal Appeal in such a case as the present. The point was reserved by Phillimore J. in *Callaghan*, 8 Cr. App. R. 185: 1913. In the opinion of the Court, there seems to be no reason for holding that an appeal does not lie. Under s. 3 of the Criminal Appeal Act, 1907, a prisoner can appeal on a question of fact

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alone with the consent of the Court of Criminal Appeal, or upon the certificate of the judge who tried him (*a*).

The question, therefore, is whether it was proved at Quarter Sessions that the appellant had broken his recognisance to be of good behaviour during the period mentioned. The Quarter Sessions did not purport to convict him on the ground that the matters complained of by his employer constituted a breach of the recognisance—it was inconceivable that they did—but because of the larceny of the rug and the lantern. Appellant said that that theft was committed before the period of the recognisance began. There was no evidence before the Court to the contrary, and, therefore, no evidence that there had been any breach of the recognisance. Quarter Sessions had, therefore, no power to pass the sentence of eighteen months' imprisonment with hard labour, and it must be quashed.

Sentence quashed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SALTER.

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16 *February.*

JOSEPH SELKIRK.

In the case of a short sentence, where an appeal cannot be speedily heard, the Court may grant bail.

Application for bail.

Applicant was convicted on December 6th, 1924, before Mr. Commissioner Hollis Walker, K.C., at Birmingham Assizes, of conspiracy to defraud, and was sentenced to four months' imprisonment in the second division.

On December 18th, 1924.

Sir Henry Maddocks, K.C. (with him *Eales*) for the applicant. Applicant was a man of good character, and had been employed

(*a*) Cf. *Moses Davies*, 1909, 1 K. B. 892; 2 Cr. App. R. 31: sentence q.

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by Barclays Bank, Ltd., for twenty-three years. In 1924 he was manager of a branch of the bank at Birmingham. He was convicted of conspiring, with a woman named Terry, to defraud the bank. He did not receive a penny from the conspiracy. He allowed Terry to have larger overdrafts than he should have permitted, and to prevent his head office knowing what he had done he omitted to enter those overdrafts in the books. The appeal will be grounded on alleged insufficient direction with regard to criminal intent. The charge of conspiracy, on which applicant was convicted, rested on facts on which were based counts in the indictment alleging falsification of accounts by appellant on which applicant was acquitted. The sentence is short, and if the appeal is not heard until the middle of January it will be materially increased.

The Crown was not represented.

The LORD CHIEF JUSTICE: The Court will grant bail. Bail must be given by applicant himself in £500, and by two sureties in £250 each.

Bail granted.

On February 16th the application was heard.

The same counsel appeared for applicant.

Roome for the Crown.

Application dismissed.

Solicitor for Applicant—*C. B. Kitchin.*

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ROCHE AND MR. JUSTICE TALBOT.

1925
2 *March.*

THOMAS CAVENDISH CURTISS.

A defence of breaking and entering under a bonâ fide *claim of right must be definitely put and explained to the jury, and the issue of felonious intent must be distinctly raised.*

Appeal against conviction and sentence.

Appellant was convicted on February 4th, 1925, before the Deputy-Chairman, at London Sessions, of shopbreaking, and was sentenced to three months' imprisonment.

Morey for the appellant, who was present. Appellant entered into partnership with the prosecutrix in July, 1923. The partnership agreement provided for a month's notice on either side to terminate it. In September, 1924, they had a quarrel, and appellant left the business and wrote to the prosecutrix saying that he did not intend to return. He was convicted of breaking into the place of business and stealing the books, but he did so under a *bonâ fide* claim of right. [He was stopped.]

Dunbar for the Crown. Whether or not appellant was acting under a claim of right was a question for the jury, which they answered adversely to him. After he left the business he had no right of access to the books by breaking into the business premises as he did. The case was properly put to the jury, who had evidence before them that the books were the property of the prosecutrix.

The LORD CHIEF JUSTICE: Appellant was not defended at the trial, and it does not appear that the question was raised whether, when he broke into the premises, he acted under a *bonâ fide* claim of right. The evidence that the books were the property of the prosecutrix, and the evidence that the appellant acted with

felonious intent, are difficult to discover. The summing-up was a careful one, but it does not seem to have been sufficiently observed that this "felony," as it was called, was committed in the presence of the prosecutrix and a policeman, and that it was not until after more than a month that criminal proceedings were begun. Moreover, the inadequacy of the materials on which the jury were invited to assume that the books had become the property of the prosecutrix, and that the intent of the appellant in doing what he did was felonious, does not appear to have been brought sufficiently to the attention of the jury. The Court is, therefore, of opinion that this conviction must be quashed.

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2 *March.*

THOMAS CAVENDISH CURTISS.

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Conviction quashed.

Solicitor for the Appellant—*W. Drake.*

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ROWLATT AND MR. JUSTICE SWIFT.

WILLIAM BALDWIN.

16 *March.*

Questions in cross-examination of the defendant should not be framed so as purposely to found on the answer evidence of his bad character, nor in his examination-in-chief, so as to expose him to such a risk.

Whether eliciting facts which may be taken to be evidence of normal respectability, "lets in" evidence of bad character, quære.

General observations on the form of interrogation of witnesses.

Appeal against conviction and sentence.

The appellant was convicted on February 20th, 1925, before Greer J., at Manchester Assizes, of having had unlawful carnal knowledge of a girl under sixteen, and he was sentenced to four months' imprisonment.

Granville Sharp for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. At the trial the appel-

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WILLIAM BALDWIN.

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lant was cross-examined about his character on the ground that he had attacked the character of the prosecutrix. The "attack" consisted in his saying during cross-examination that he regarded the charge against him as blackmail. That did not render him liable to be cross-examined regarding his character. Moreover, the questions which elicited his answer were improper inasmuch as they seemed to be put with the object of provoking an attack on the prosecutrix and so letting in the cross-examination. He referred to *Beecham*, 1921, 3 K. B. 464; 90 L. J. K. B. 1370; 85 J. P. 276; 65 S. J. 768; 37 T. L. R. 932; 16 Cr. App. R. 26. [He was stopped.]

N. B. Goldie for the Crown. The questions were not intended to lead to the Crown's being able to administer cross-examination which otherwise would not have been possible. The cross-examination of the appellant about character was justifiable since he did not stop at a denial of the charge, but went on to suggest that it was blackmail and that the prosecutrix was shielding someone else. That went further than was necessary to protect innocence and introduced a fresh element into the case.

The LORD CHIEF JUSTICE: The appellant was charged with having had unlawful carnal knowledge on three occasions of a young girl, named Maggie Prescoll, who was born on September 20th, 1910. It is not necessary to enter into the history of the case. There came a time when the appellant at the trial gave evidence on his own behalf. He said that his acquaintance with the child was only slight before an interview on December 15th, 1924, at which her mother told him that Maggie was pregnant and asked him what he was going to do about it. He said that he denied that he had had anything to do with her. Mrs. Baldwin's evidence was to the same effect. When the appellant was being cross-examined this passage in the evidence occurred. Counsel for the prosecution asked: "The girl says until the beginning of the year she never knew you, but that then you used, quite naturally and properly, to say good night to her. Is that wrong?"—"I have only spoken to that girl twice in my life." Then comes this question: "Then can you suggest any reason at all why this girl should invent this story against you? Has she got any particular 'down' on you?"—

"I do not know—not without it is regarding getting some money off me and my parents." "To put it plainly, you regard her story then as blackmail?"—"Certainly, sir." "I took down very carefully what my learned friend said to Maggie in putting questions. Do you agree that what she is doing is trying to shield some boy and not telling the truth with regard to you?" —"Yes." "In other words, she is an immoral girl, is that it?" Counsel continued: "Are you a particularly moral man yourself?"—"Yes." Counsel then said: "I submit that I am entitled now to pursue a certain line of cross-examination." Counsel on the other side said: "Because my case is that this girl is untruthful?" The judge said: "I think so." Thereupon there followed cross-examination to show that the appellant was paying money under the terms of a bastardy order.

Some other questions have been mooted on this appeal; but this is without doubt the real question. Under the Criminal Evidence Act, 1898, s. 1, para. (f) of the proviso provides as follows: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." It seems quite clear in the present case that certain questions were asked at the beginning of the evidence-in-chief of the prisoner which it is difficult to suppose were likely to produce any other effect than to indicate at least to the jury that the defendant was a person of good character, a respectable family man, not in the least likely to commit the sort of offence with which he was then being charged. The questions were: "Baldwin, what age are you?"—"Thirty-two, sir." "You are a married man?"—"Yes." "What are you?"—"A joiner." When questions of that kind are asked, no matter what degree of ingenuity they may be thought to display, the client on whose behalf they are asked is put in great peril; and it will not be in the least surprising if, when the case arises, some

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learned judge were to say: "As the counsel for the defendant has thought it right to elicit the fact that this man is a married man with children, you, if you like, may elicit the fact, if you believe it to be the fact, that he is also a person who is the father of illegitimate children." There cannot be license to the defence if there is to be strictness for the prosecution. But Mr. Goldie, with his usual candour, has frankly admitted that it was on no such ground as that that he cross-examined the appellant on character. He put the questions to which attention has been directed on the ground that, apart from what the appellant had said in answer to any questions, the nature and the conduct of the defence were such as to involve imputations on the character of the prosecutrix and the witnesses for the prosecution. He did not put them in order to provoke imputations and so prepare the way for cross-examination to character. It is not necessary to say that counsel's assurances upon this point are to be accepted. The fact remains that these questions were put, and that, whatever else might have been done or whatever other arguments might have been adduced, the judge admitted this cross-examination. The law on this matter is perfectly clear. One would have thought that it did not need a decision. It cannot be right for counsel for the Crown to ask questions for the purpose of eliciting answers which may be of such a kind as to involve the accused person inadvertently in the mischief provided for in this part of the statute. That was made quite plain, for example, in *Beecham* (above). In that case it was said in the judgment of this Court: "With regard to the cross-examination, we are bound to say that we cannot approve of the manner in which the appellant was led by counsel for the prosecution into making the statement which it was contended amounted to putting his character in issue."

There is a further matter involved here which goes far beyond the present case, and, it may be, beyond criminal cases. One so often hears questions put to witnesses by counsel which are really of the nature of an invitation to an argument. You have, for instance, such questions as this: "I suggest to you that . . ." or "Is your evidence to be taken as suggesting that . . . ?" If the witness were a prudent person he would say, with the highest degree of politeness: "What you suggest is no business of mine. I am not here to make any suggestions at all. I am here only to

answer relevant questions. What the conclusions to be drawn from my answers are is not for me, and as for suggestions, I venture to leave those to others." An answer of that kind, no doubt, requires a good deal of sense and self-restraint and experience, and the mischief of it is, if made, it might very well prejudice the witness with the jury, because the jury, not being aware of the consequences to which such questions might lead, might easily come to the conclusion (and it might be true) that the witness had something to conceal. It is right to remember in all such cases that the witness in the box is an amateur and the counsel who is asking questions is, as a rule, a professional conductor of argument, and it is not right that the wits of the one should be pitted against the wits of the other in the field of suggestion and controversy. What is wanted from the witness is answers to questions of fact.

One even hears questions such as: "Do you ask the jury then to believe . . . ?" The witness may very well reply: "I am asking the jury nothing; my business is to tell whatever is relevant that I know and that I am asked to tell, and therefore my answer to your question and to all such questions is 'No, I do not.'" But in practice, both in civil cases and in criminal cases, one finds this line of cross-examination employed. It is a mischievous line and it is never more mischievous than when it has the effect of inducing a witness, inadvertently or, it may be, even in a mood of irritation, to make the kind of attack that, under s. 1 of the statute, lets in certain other evidence which, but for that attack, would not be let in. These matters are not to be ignored by counsel who appear for the prosecution. They are equally not to be ignored by counsel who appear for the defence, because so often questions are asked which are ingeniously calculated up to the very last point to be consistent with abstinence from putting the defendant's character in issue, while undoubtedly the probable, as it is the intended, effect of those questions is to exhibit the man to the jury as a person of good character. Counsel for the defence should refrain from such questions for prudential reasons. Counsel for the prosecution should refrain from them for reasons of fairness, because the Crown has no interest whatever in securing a conviction. Its sole interest is to convict the right man.

In these circumstances, we think that this evidence ought not

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to have been admitted. We are not satisfied that, if it had been excluded, the jury would inevitably have come to the like conclusion. It follows, therefore, that this appeal must be allowed and this conviction quashed.

Conviction quashed.

G. B.

LEWIS MORGAN.

No fresh indictment (as distinguished from counts) may be preferred on the ground that facts are disclosed on the depositions without the consent of the Court.

Copies cannot be put in of letters of which notice to produce ought to be given.

Appeal against conviction.

The appellant was convicted on February 20th, 1925, before MacKinnon J., at Cardiff Assizes, of obtaining money by false pretences and was sentenced to six months' imprisonment.

R. G. S. Bankes for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The appellant was not committed for trial at the assizes on the charge on which he was convicted. He was committed on charges of conspiracy to defraud and obtaining goods by false pretences. The indictment containing those charges was, however, not proceeded with. A second indictment was, without the leave of the Court, preferred before the Grand Jury charging the appellant with obtaining money by false pretences and the appellant was convicted on that indictment, the other indictment being ordered to remain on the file. The provisions of s. 1 of the Vexatious Indictments Act, 1859, and the Criminal Law Amendment Act, 1867, do not permit of this being done. [He was stopped.]

Bertram Long for the Crown. It was decided in *Mosley*, 1924, 2 K. B. 187; 93 L. J. K. B. 894; 18 Cr. App. R. 69; 130 L. T. 831; 27 Cox, C. C. 635; 68 S. J. 757; 88 J. P. 91, that counts for offences within the Vexatious Indictments Act, 1859, may be added to an indictment without the leave of the Court where they are founded on facts disclosed on the deposi-

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tions. A count is in effect a separate indictment, and therefore, where an indictment is founded on facts disclosed on the depositions, it may be presented without the leave of the Court.

The LORD CHIEF JUSTICE: The really substantial point of this appeal is under the Vexatious Indictments Act, 1859, and the Criminal Law Amendment Act, 1867. It was held in *Mosley* (above) that *counts* for offences within the Act of 1859 may be added to an indictment without the leave of the Court of trial where they are founded on facts disclosed on the depositions. Here a fresh *indictment* was preferred on facts said to be contained in the depositions. No case has gone that length. Moreover, it is clear that the crucial correspondence was proved at the trial by the tender of copies no notice to produce the originals of which had been given. There remains on the file another indictment for conspiracy to defraud and obtaining goods by false pretences. This appeal must be allowed. The prosecution may proceed on the other indictment, but we think that the proper order should be that the appellant is discharged. If the prosecution carry the matter further they can give notice to the appellant to appear at the assizes, where, if he does not appear, a bench warrant can be issued.

Conviction quashed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ROCHE AND MR. JUSTICE TALBOT.

JAMES COPE.

"Examine into the circumstances of the case," under s. 10 *of the Vagrancy Act,* 1824, 5 *Geo.* 4, *c.* 83, *means in the presence and hearing of the defendant. A conviction at Petty Sessions must be strictly proved above.*

Appeal against sentence.

The appellant was convicted on January 22nd, 1925, at Birmingham Petty Sessions, as a rogue and vagabond. As he

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had formerly been adjudged to be a rogue and vagabond, he was deemed to be an incorrigible rogue and sentenced as such to hard labour until the next Quarter Sessions, when he came up for further sentence and was sentenced to twelve months' imprisonment with hard labour.

Sinclair Johnston for the appellant (under s. 10 of the Criminal Appeal Act, 1907). Quarter Sessions had no jurisdiction to deal with the appellant. No proof was given before them of the appellant's conviction as an incorrigible rogue and his committal for sentence. Moreover, the circumstances of the matter were not examined in his presence before he was sentenced. The Court apprised themselves of those circumstances during the trial of a man who had been arrested with the appellant, but was tried under s. 7 of the Prevention of Crimes Act, 1871.

Dawson Sadler for the Crown. *Deane*, 18 Cr. App. R. 133: 1924, is too wide. It is not necessary that a police officer should produce the conviction and then identify the defendant. Here the conviction and committal were before the Court and the appellant sufficiently identified himself. There is nothing in the statute to prevent Quarter Sessions obtaining the circumstances of the case from the notes sent from Petty Sessions and from counsel in the absence of the defendant. Counsel for the defendant can only mitigate.

[He was not heard on the reasons for the difference of treatment between the various defendants.]

The LORD CHIEF JUSTICE: The appellant was convicted before the stipendiary magistrate at Birmingham of loitering with intent to commit a felony. That caused him to be a rogue and vagabond within s. 4 of the Vagrancy Act, 1824, as amended by s. 7 of the Penal Servitude Act, 1891. As he had been previously found to be a rogue and vagabond the effect of the new conviction was that he became an incorrigible rogue under s. 5 of the Vagrancy Act, 1824, and thereupon he was committed under s. 9 of the Act to the Quarter Sessions for sentence. There he was sentenced to twelve months' imprisonment with hard labour. He now appeals against that sentence.

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It appears that at about 10 p.m. on the night of January 17th, 1925, the appellant was seen by detectives with three men named Witton, Baker and Rushmore, pushing against persons who were getting into omnibuses and tramway cars and putting his hand into several men's pockets. He applied to be tried by a jury, but he was told that on that charge he could not be so tried. Witton, on the other hand, was charged under s. 7 of the Prevention of Crimes Act, 1871, on exactly the same facts, and he was acquitted by a jury at the Quarter Sessions just before the appellant was sentenced and in his absence. No doubt the course that was followed was quite lawful, but, unless there are good reasons for differentiating between two defendants in such a case, it is desirable that the charges should not be differentiated so that one defendant is tried by a jury and the other, although he wishes it, cannot be so tried.

But it is not on that point that this appeal turns. Two grounds have been raised on behalf of the appellant. First, it is said that there was no jurisdiction in Quarter Sessions to order a further term of imprisonment as the conviction of loitering with intent was not properly before the Court and as the appellant was not identified as the convict. That argument fails. The conviction was before Quarter Sessions and the appellant quite unequivocally admitted his identity. Nevertheless, it is highly desirable that the old and safe practice should be observed by which in such a case a witness is called, ordinarily a police officer, who, with the certificate of conviction before him, identifies the defendant as being the person referred to in the conviction.

Secondly, it was argued that the provisions of s. 10 of the Act, which permits the Court of Quarter Sessions to "examine into the circumstances of the case and to order, if they think fit, that such offender be further imprisoned" for a term not exceeding a year, have not been complied with. There was no examination into the circumstances of this case in the presence and hearing of the appellant. The events of January 17th had been explored at considerable length when Witton was on trial, and it may well be that the justices were of opinion that their minds were sufficiently informed of the circumstances relating to the appellant. It cannot, however, seriously be argued that when the section provides that the justices are to "examine into the circumstances of the case" it is meant that somehow, at some time, however

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casually and in the absence of the defendant, there shall be some investigation of the circumstances. The examination of the circumstances of the case must be in that case and not in some other case. It must be in the presence and hearing of the defendant in order that he may have proper opportunities of dealing with those circumstances by cross-examination if he so desire. Here there was no such examination, and the sentence passed on the appellant must be quashed.

Sentence quashed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SANKEY.

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CORNELIUS DRISCOLL.

On the allegation that defendant is a habitual criminal, the onus *is on the prosecution of proving that the interval in issue was not honestly employed; it is not shifted because he gives evidence.*

Appeal against sentence and application for leave to appeal against conviction as a habitual criminal.

The appellant pleaded guilty on February 3rd, 1925, before the Deputy-Chairman at London Sessions to a charge of shopbreaking and was sentenced to three years' penal servitude. He was then found to be a habitual criminal and was sentenced to five years' preventive detention.

The appellant, in person, added nothing to his written statement.

Ronald Powell for the Crown. The appellant and another man pleaded guilty to an indictment charging them with breaking and entering shops and stealing furs. The appellant was also found to be a habitual criminal. The statutory notice served on him alleged three previous convictions—in 1908, 1914 and 1921—and stated that the appellant had been leading persistently a dishonest or criminal life. His last previous conviction

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was passed in September, 1923. He was then sentenced to twelve months' imprisonment as a suspected person under the Prevention of Crimes Act, 1871, and he was released on July 23rd, 1924. The substantive offence with which he was charged on the occasion with which this appeal has to do was committed on January 2nd, 1925. It appears that the appellant was employed by the keeper of a fish shop from September to December, 1924. His employer stated that the appellant was employed by her at 2*s*. to 3*s*. a day, that he worked from 7.30 a.m. till 11 a.m. and from 3.30 p.m. to 7.30 p.m. and also on Sundays, and that his employment came to an end in December, 1924, because her business became slack. The whole question, whether or not the appellant was a habitual criminal, however, was before the jury. Where there is evidence, as there was here, that a prisoner is leading a dishonest or criminal life, the prisoner must satisfy the jury that he is not a habitual criminal. In any case, no substantial miscarriage of justice has occurred.

The LORD CHIEF JUSTICE, having stated that the sentence of three years' penal servitude was not excessive, continued: It may be that, on a proper direction, notwithstanding the interval between release and conviction and the work done by the prisoner between September and December, 1924, the jury might properly have drawn the inference from his crime on January 2nd, 1925, coupled with what he was shown previously to have done, that he was leading persistently a dishonest and criminal life. Speaking for myself, I should have found great difficulty in coming to that conclusion. But, if it was to be reached, that conclusion could only be reached on a proper direction, by which it was made perfectly plain to the jury that the business of the prosecution was to prove affirmatively that at the relevant period the appellant was leading persistently a dishonest or criminal life. Obviously, there are passages in the summing-up which might have conveyed to the minds of the jury, and indeed possibly to the minds of lawyers, that when the prosecution had gone a certain way in proof the burden rested on the appellant to disprove the charge of habitual criminality, and that the true question at the conclusion of the whole matter was whether the appellant had satisfied the jury that he had turned over a new leaf.

It cannot too clearly be understood in this class of case that it

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is for the prosecution to establish their case. It is a surprising proposition that, although it is for the prosecution to establish affirmatively that the defendant is leading persistently a dishonest or criminal life at the crucial time if the defendant gives no evidence, yet, if the defendant gives some evidence of the way in which, for example, he says he has innocently spent an interval between release from prison and the commission of a fresh offence, he undertakes the burden of proof, and it is then for the jury to say whether they are satisfied that he has turned over a new leaf. No doubt there are difficulties arising from the subject-matter of these cases, but it is always for the prosecution to satisfy the jury that the prisoner was at the critical time a habitual criminal. It is by no means clear that in the present case the jury, with a proper direction, would have come to the same conclusion as that to which they came, and this appeal must be allowed.

Conviction quashed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SALTER.

6 & 7 *April.*

JOHN NORMAN HOLMES THORNE.

The mere fact that conflicting medical views of the evidence in a case were put before the jury is not a ground for granting leave to appeal.
Sub-ss. (d) and (e) of s. 9 of the Criminal Appeal Act, 1907, considered.

Application for leave to appeal against conviction.

The applicant was convicted on March 16th, 1925, before Finlay J. at Lewes Assizes of murder, and was sentenced to death.

Jowitt, K.C. (with him *Cassels, K.C.*, *Cecil Oakes* and *Charles Abbott*), for the appellant. Applicant was convicted of the murder on December 5th, 1924, at a hut on his chicken farm near

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Crowborough, of a girl named Elsie Emily Cameron, to whom he had formerly been engaged. His defence was that he left the girl in the hut, that on his return he found her hanging dead from a beam, that he cut the body down and placed it on the bed, and then, realising that his position might be construed as a guilty one, he cut up the body and buried it. The medical evidence called for the prosecution and for the defence agreed that the girl died from shock, but, whereas Sir Bernard Spilsbury, called by the prosecution, expressed the opinion that the girl's face showed signs of bruising (which would have been consistent with the theory of the prosecution that the applicant knocked her down and hit her with a blunt instrument), the doctors called for the defence said that in their opinion there was only a *post mortem* change. There was also difference of opinion whether or not there were rope marks round the girl's neck. It is submitted that this is the case contemplated by the Legislature when it passed s. 9 (d) and (e) of the Criminal Appeal Act, 1907, which give the Court power to refer to "a special commissioner" "any question" involving "scientific . . . . investigation which cannot in the opinion of the Court conveniently be conducted before the Court," or "to appoint any person with special knowledge to act as assessor to the Court in any case where it appears that such special knowledge is required for the proper determination of the case." There was, further, misdirection of the jury by the judge at the trial, and the verdict was against the weight of evidence.

Sir Henry Curtis Bennett, K.C. (with him *Raymond Negus*) for the Crown, were not called upon.

The LORD CHIEF JUSTICE stated the facts and continued:—It is quite idle to say that the verdict was against the weight of evidence. But two other matters have been urged. The attention of the Court has been directed to s. 9 (d) and (e) of the Act of 1907. Undoubtedly the Legislature has armed this Court with the widest possible powers for the purposes of investigation, and in a proper case this Court would not refuse to make use of the powers which are contained in these paragraphs of s. 9. But it is a fundamental principle in this country that the issues of criminal cases are to depend on trial by jury, and where the question arises whether the verdict of a jury in a criminal case

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ought to be disturbed, this Court will hesitate long before it transfers, or even seems to transfer, to a medical expert, or medical experts, the determination of a question on which a jury, having conflicting views before them, has arrived at a unanimous conclusion. In the opinion of this Court there is nothing whatever in this case which makes it desirable to have recourse to the special and exceptional powers provided by s. 9 of the Act of Parliament. Those who know anything of criminal trials in this country know with what an anxious sense of responsibility every member of the jury, like the judge, approaches and performs his task. There is no ground whatever for suggesting that, in the present case, the jury failed to appreciate, or would not be likely to have the capacity to discriminate between, the conflicting views placed before them on the medical and surgical facts of the case.

His Lordship added that there was nothing in the contention that there had been misdirection of the jury by the judge.

Application dismissed.

Solicitor for the Appellant—*E. A. R. Llewellyn.*

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SHEARMAN.

CATHERINE THORPE.

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27 *April.*

If on a trial for murder in the opinion of the judge there is no evidence on which the jury may properly find a verdict of manslaughter, that issue should not be left to them. But where there is such evidence the issue ought to be left to them, even though the defence is not raised on behalf of the accused, and is not consistent with the defence so raised.

Application for leave to appeal against conviction.

Applicant was convicted on April 1st, 1925, before Branson J. at Leeds Assizes of murder, and was sentenced to death.

C. J. Frankland for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. The direction of the jury by the judge was incomplete, inasmuch as it dealt only with the verdicts of guilty of murder and of acquittal, and ignored the intermediate verdict of manslaughter. There was evidence of provocation sufficient to reduce the crime to manslaughter, and the issue should have been left to the jury even though it was not raised by the defence at the trial, and even though it is inconsistent with the defence actually raised, namely, that of accident. In *Hopper*, 1915, 2 K. B. 431; 84 L. J. K. B. 1371; 113 L. T. 381; 79 J. P. 335; 31 T. L. R. 360; 11 Cr. App. R. 136, a verdict of manslaughter was substituted by this Court. *Clinton*, 12 Cr. App. R. 215: 1917, was also mentioned.

The facts appear sufficiently in the judgment.

Mitchell-Innes, K.C. (with him *J. Charlesworth*) for the Crown. If the jury had found a verdict of manslaughter it would have been the duty of the judge to refuse to accept it, since there was no evidence of such provocation as would reduce the crime to manslaughter.

Frankland, in reply, referred to *Lesbini*, 1914, 3 K. B. 1116; 84 L. J. K. B. 1102; 112 L. T. 175; 11 Cr. App. R. 7; and *T. Mason*, 8 Cr. App. R. at p. 125: 1912.

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The LORD CHIEF JUSTICE: The real ground of appeal in this case is that, although the defence did not raise the question of manslaughter, and although the defence of manslaughter would have been inconsistent with the defence which was in fact raised, the judge ought to have left the question of manslaughter to the jury. Musgrove was twenty-three years of age. He was a musician and teacher of music, and played the piano at a public-house at Bradford in the evening and at another public-house at midday. A moralist might observe that both the main figures in this case were married and separated. Musgrove was a married man with two children who did not live with his wife. The applicant was twenty-one years of age. She lived with her mother, who had divorced her husband. When the applicant was aged eighteen she had a child, and soon after the birth she left her husband. She afterwards returned to him, but she left him again and she met Musgrove a few months before Christmas, 1924. About Christmas time she learned that Musgrove was a married man living apart from his wife. Intimacy took place between them. On the afternoon of January 9th the applicant and Musgrove were seen apparently quarrelling in the street, and on that night the applicant told a man that she was going to "knife" Musgrove. At 5 p.m. on January 10th she called at a butcher's shop, and when she had gone a knife was missed. On that evening the applicant told a barman that she was going to "do it on" Musgrove that night, and said that it was because she loved him. She also told a friend that she was going "to do someone in," and said something to the same effect to two women in a public-house. Later, she and Musgrove were seen walking along the street. The applicant was a few paces in front of Musgrove. She was heard to say: "I am not going to be humbugged by you any more," and she was seen to take something out of her handbag and to turn round and stab the man. After she had been arrested she said that she had taken the knife to frighten him.

In these circumstances, was it the duty of the judge to leave to the jury a possible alternative defence of manslaughter? He was not asked to do so. That defence was not so much as suggested. It was, moreover, inconsistent with the defence which was in fact put forward by the applicant. But it is said that there were materials here which, if they were disengaged from

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CATHERINE THORPE.

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the rest of the applicant's evidence, might have offered a foundation for a verdict of manslaughter. The law with reference to such a matter is stated in the judgment of this Court in *Hopper* (above). It is to be observed that in that case, although counsel for the applicant relied substantially on the defence of accident, he clearly indicated to the jury that, in the event of their not accepting the theory of accident, he would ask them to find that the crime was manslaughter and not murder. Lord Reading C.J., said in his judgment: "It is not in our opinion correct to say that there was no alternative but to find accident or murder. There was sufficient evidence to justify the jury, if they accepted a certain view of the facts and circumstances, to find a verdict of manslaughter. It is not for us to say whether they would have found such a verdict, but the question is whether it should have been left open to them to find it if they thought fit." Lord Reading then stated the principle as follows:—"We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question about manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself."

That principle is not in the smallest degree in conflict with the judgments in such cases as *T. Clinton* (above) and *G. H. Robinson*, 16 Cr. App. R. 140: 1922. If there is no evidence on which a verdict of manslaughter can properly be found, it is the duty of the judge not to leave the question of manslaughter to the jury, but if there is evidence, then it is the duty of the judge to leave the question to the jury, notwithstanding that it has not been raised by the defence, and is inconsistent with the defence which is raised.

Here the evidence on which it is suggested that the defence of manslaughter ought to have been left to the jury by the judge on his own motion, was a fraction of the evidence of the applicant. It was the evidence that, although no blow was struck, there were used to her words of reproach which were accompanied by pushing and jostling. It is for the judge to put to the jury such questions as appear to him properly to arise on the evidence. That means that, in such a case as *Hopper*, he has to put the alternative

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defence of manslaughter if there is evidence on which the jury can reasonably reduce the crime from murder to manslaughter. In that case the Court was clearly of opinion that there was sufficient evidence to justify the jury, if they accepted a certain view of the facts and circumstances, in finding a verdict of manslaughter, but can it be said that that is the case here? In our opinion that cannot truly be said. The prosecution have urged that if there had been a formal submission to the judge that on the evidence the defence of manslaughter ought to be left to the jury, he would have been entitled to say that there was no evidence on which the jury could properly arrive at such a verdict. If that ruling had been made on a submission of that kind, the judge, in our opinion, would have been right. There being here no evidence which would justify the jury in finding a verdict of manslaughter, there was no duty on the judge to leave that defence to the jury, and the appeal must be dismissed.

Application dismissed.

G. B.

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4 *May.*

HENRY CAREY FOX.

In a proper case the Court will order that the period of "special treatment" (under s. 14 of the Criminal Appeal Act) of an appellant already serving a sentence shall not be added to that term.

Observations on cumulative charges.

Appeal against conviction and sentence.

Appellant was convicted on April 9th, 1925, before the Chairman, at Westmorland Sessions, of obtaining a cheque by false pretences, and was sentenced to eighteen months' imprisonment with hard labour.

Alexander Cairns for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The summing-up was inadequate both as regards law and fact.

[He was stopped.]

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HENRY CAREY FOX.

Hewart L.C.J

P. M. Oliver for the Crown. There was grave objection to the summing-up, but on the whole it put the law clearly and the facts sufficiently.

The LORD CHIEF JUSTICE: At the trial in this case there was the clearest contest on the facts, and especially on the question whether or not there was an intent to defraud. It was essentially a case for a careful and detailed summing-up, but the summing-up of the Chairman was not sufficient. As it does not appear that the jury must have come to the same conclusion if the summing-up had been adequate this appeal must be allowed, and the conviction of the appellant must be quashed.

Appellant is already serving a sentence of twelve months' imprisonment with hard labour, passed on him in January, 1925. When he was sentenced on the occasion with which we have to deal, a third case—one of obtaining a cheque by fraud on December 22nd, 1924—was taken into consideration by the Court; the date of that offence is before the date charged in the present indictment. In view of those circumstances, and also of the fact that for seventeen years the appellant was not convicted of any offence, the Court thinks that those responsible for the prosecution will probably decide that no further proceedings need be taken on the charge relating to the offence of December 22nd, 1924. If the appellant, after he had appealed, received special treatment and privileges in prison, the Court orders that the time during which he received those privileges is to count towards his sentence.

Conviction quashed.

G. B.

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